93-6497

No. 93-1954

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

FRANK BASIL McFARLAND,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Does a federal district court possess jurisdiction to grant a stay of execution under either 28 U.S.C. § 2251 or 28 U.S.C. § 1651 (a), in order to appoint counsel for an indigent *pro se* death row inmate who has not yet filed a habeas corpus petition but who has expressed an intention to file a petition once counsel is obtained?

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TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

NOW COMES, James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein ("the Director"), by and through the Attorney General of Texas, and files this Brief.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was delivered on October 26, 1993, and is

published as *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993). JA 81.[1]

JURISDICTION

McFarland attempts to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

McFarland bases his claim on 28 U.S.C. § 2251, 28 U.S.C. § 1651(a), 28 U.S.C. § 2283, and 21 U.S.C. § 848 (q) (4) (B).

STATEMENT OF THE CASE

The Director has lawful custody of McFarland pursuant to a judgment and sentence of Criminal Court Number 3, Tarrant County, Texas. McFarland was indicted on March 23, 1988 in Cause Number 0336837D for the capital murder of Terry Hokanson in the course of committing aggravated sexual assault. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon Supp. 1991). McFarland entered a plea of "not guilty" to the indictment. Trial on the merits commenced on October 26, 1989, and on November 13, 1989, the jury returned a verdict of guilty as charged in the indictment. Following a separate hearing on punishment, the same jury affirmatively answered two special issues submitted to it pursuant to Article 37.071(b) of the Texas Code of Criminal Procedure. Thereafter, the trial court sentenced McFarland to death by lethal injection.

McFarland's case was automatically appealed to the Texas Court of Criminal Appeals, which affirmed his conviction and sentence on September 23, 1992. *McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992). Rehearing was denied on

[1] "JA" refers to the Joint Appendix.

December 9, 1992. The Texas Appellate Practice and Education Resource Center (hereinafter "the Center") withdrew records of McFarland's trial and appeal from the Court of Criminal Appeals on January 19, 1993, and returned them on January 25, 1993. JA 98.

Jack V. Strickland, who represented McFarland on direct appeal to the Court of Criminal Appeals, evinced his intent to continue representing McFarland by filing on December 12, 1992, a motion to stay the mandate in the Court of Criminal Appeals to allow adequate time to file a certiorari petition. *See* Appendix B to Respondent's Opposition to Application for Stay of Execution in the district court (Strickland's Motion to Stay the Mandate). This apparently was Strickland's last appearance as counsel for McFarland. The motion was granted, and the mandate stayed until March 12, 1993. After receiving correspondence from the Center on March 11th and April 19th, McFarland wrote to Strickland. *See* Appendix C to Opposition to Application for Stay of Execution in the district court (TDCJ-ID-Outgoing Mail Log). Following that correspondence, Strickland no longer appeared as counsel of record.

On March 9, 1993, Isaiah Gant of Nashville, Tennessee, an attorney recruited by the Center, filed a petition for writ of certiorari, which was denied on June 6, 1993. *McFarland v. Texas*, 113 S.Ct. 2937 (1993). More than two months later, on August 16, 1993, the state trial judge, Judge Leonard, entered an order scheduling McFarland's execution for September 23, 1993. JA 3-5. By letter dated September 19, 1993, Eden Harrington of the Center asked Judge Leonard to withdraw McFarland's scheduled execution date because it would take "at least 120 days" to locate new counsel for McFarland, and recruited or appointed counsel should be allowed at least an additional 120 days to prepare the state habeas application. JA 6-10. The following day, the trial court conducted a hearing attended by Lynn Lamberty of the Center and representatives of the Tarrant County District Attorney's Office. Lamberty asked the Court to withdraw McFarland's execution order to allow the

Center to find new counsel and to allow newly recruited counsel to file a state habeas application "within 120 days after the notice of recruitment of counsel is filed with this Court." JA 11. Judge Drago, sitting for Judge Leonard for purposes of the hearing only, denied the Center's request and ordered the modification of McFarland's execution to October 27, 1993. JA 12.

Judge Leonard received a second letter and proposed order from the Center, dated October 16, 1993. In the letter, the Center stated that it still had not secured counsel for McFarland and again asked the court to withdraw the execution date. JA 16-19. On October 21, 1993, with the assistance of the Center, McFarland filed a *pro se* application for stay of execution and motion for appointment of counsel in the Court of Criminal Appeals. JA 21-23. Neither the stay application nor the motion for appointment of counsel was presented to the trial court. JA 89-90. The Court of Criminal Appeals denied the application for stay and the motion on Friday, October 22, 1993. JA 40.

The same day, with the assistance of the Center, McFarland filed *pro se* a motion for stay of execution and for appointment of counsel in the United States District Court for the Northern District of Texas, Fort Worth Division, docketed as No. 4:93-CV-714-A. JA 41-45. No federal habeas corpus petition was filed. On October 25, 1993, the district court denied a stay of execution because McFarland had not invoked its jurisdiction by filing a federal habeas petition. JA 76-78. On October 26th, the district court struck from the record McFarland's application for a certificate of probable cause to appeal (CPC), because the action did not represent an habeas proceeding. JA 79-80. The United States Court of Appeals for the Fifth Circuit denied CPC and a stay at approximately 6 p.m. the same day. JA 85-88; *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993). The Court then granted McFarland's subsequent application for stay of execution pending disposition of the instant petition for certiorari review. *McFarland v. Collins*, 114 S.Ct. 544 (1994).

At approximately 6 p.m. on October 26th, McFarland filed a motion for appointment of counsel and stay of execution and a federal petition for writ of habeas corpus, No. 4:93-CV-723-A, in which he raised one ground for relief. In an order that addressed the merits of McFarland's claim, the district court denied a stay of execution. McFarland's subsequent motion for leave to file an amended habeas petition did not include any additional grounds for relief and was denied by the district court at approximately 8:30 p.m. CPC was denied by the district court at 10:17 p.m. A motion for stay of execution was thereafter granted by the Fifth Circuit at approximately 11:50 p.m. On October 28th, McFarland filed in the district court a notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a). McFarland's appeal subsequently was dismissed as moot and the stay lifted. *McFarland v. Collins*, 8 F.3d 256 (5th Cir. 1993).

SUMMARY OF ARGUMENT

McFarland's request for a stay of execution did not confer jurisdiction on the federal district court to stay the state execution. The Anti-Injunction Act is an absolute prohibition against the injunction of state court proceedings unless the injunction falls within one of the three specifically defined exceptions in the Act. The exceptions authorize a federal court to grant injunctive relief if expressly authorized by Act of Congress, where necessary in aid of a court's jurisdiction, or to protect or effectuate the court's judgments.

The authority of a federal court to stay an execution scheduled by a state court is derived solely from the express provisions of 28 U.S.C. § 2251, which require that a habeas corpus proceeding be pending before the court. In order for a habeas corpus proceeding to be pending, a petitioner must have filed a petition identifying claims of constitutional dimension and alleging the factual support for such claims. This conclusion is dictated by the plain language of the statute, its legislative history, and the decisions of the Court.

The specific statutory grant of authority in § 2251 to enjoin state court proceedings controls over the provisions of 28 U.S.C. §§ 848 (q) & 1651. Section 848 (q) does not directly authorize injunctive relief and cannot be construed to constitute an express exception to the Anti-Injunction Act under the analysis of *Mitchum v. Foster*, 407 U.S. 225 (1972). The failure to provide counsel pursuant to § 848 (q) does not implicate constitutional concerns that would be cognizable in federal habeas review and, thus, cannot establish a federal right or remedy enforceable against the states by injunctive relief. Further, no legislative history or authoritative evidence supports the inference that, in enacting § 848 (q), Congress necessarily intended that the federal habeas courts would be empowered to stay executions in order to appoint counsel under that provision. The effectiveness of the provisions for appointment of counsel do not depend on a federal habeas court's ability to stay an execution, but rather depend upon a petitioner's timely request for such an appointment.

The All Writs Act, 28 U.S.C. § 1651, does not confer jurisdiction on the federal district court where there exists no case or controversy. The Act is a residual source of authority to issue writs in aid of otherwise existing jurisdiction. Moreover, where, as here, a statute specifically applies, it is that authority and *not* the All Writs Act that is controlling. Further, because a federal district court does not have potential appellate jurisdiction over federal questions raised in state court, the All Writs Act could not have vested the district court with power to enjoin the execution "in aid of" its prospective jurisdiction.

Finally, even if it is assumed, *arguendo*, that the district court had jurisdiction to grant McFarland's requested stay of execution, to enjoin the execution of a presumptively valid state sentence where no constitutional infirmity has been identified would constitute a most egregious violation of the important interests of federalism and comity.

ARGUMENT

I. The authority of a federal court to stay an execution scheduled by a state is derived solely from the express provisions of 28 U.S.C. § 2251, which require that a habeas corpus proceeding be pending before the court.

Before a federal court may enjoin a state court proceeding, it must be shown (1) that the facts fall within one of the expressly authorized exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283, (2) that the injunctive relief does not violate interests of federalism and comity, *Mitchum v. Foster*, 407 U.S. 225, 231 (1972), *citing Younger v. Harris*, 401 U.S. 37 (1971), and (3) that the injunctive relief is appropriate under applicable standards. Where, as here, a death-sentenced inmate's state conviction and sentence have been upheld on direct appeal, the authority of a federal district court or circuit court of appeals to stay an execution is limited to the circumstances set forth in 28 U.S.C. § 2251.[2] Before a federal court may stay an execution under § 2251, there must be a pending habeas corpus proceeding in which the petitioner has made a substantial showing of the denial of a federal constitutional right. *See Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

A. *Anti-injunction Act*

The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its

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[2] The All Writs Act authorizes this Court to stay an execution pending its direct review of state collateral proceedings.

> jurisdiction, or to protect of effectuate its judgments.

The "Act is an absolute prohibition against any injunction of any state-court proceeding, unless the injunction falls within one of the three specifically defined exceptions in the Act." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146-50 (1988); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977) (plurality opinion); *Mitchum v. Foster*, 407 U.S. at 229; *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. 281, 286 (1970).

In *Mitchum v. Foster*, the Court expressly rejected the contention now advanced by McFarland that the Anti-Injunction Act is "merely an expression of the well-established rule of comity between state and federal courts," which must give way to "recognized principles of equity," "standards of good conscience," and "weightier federal interests" (McFarland's brief at 42, 44). *Mitchum v. Foster*, 407 U.S. at 228 (Anti-Injunction statute does not state a flexible notion of comity, but rather an absolute ban in the absence of one of the three exceptions); *see also Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. at 286. Concerns of comity and federalism only come into play if, as in *Younger v. Harris*, one of the statutory exceptions first applies. *See Mitchum v. Foster*, 407 U.S. at 231 ("if § 1983 is not within the statutory exception, then the anti-injunction statute would have absolutely barred the injunction issued in *Younger*, . . . and there would have been no occasion whatever for the Court to decide that case upon the 'policy' ground of 'Our Federalism.'").

McFarland's argument also relies on mischaracterizations of the first and second exceptions to the Anti-Injunction Act. The first exception for injunctions "expressly authorized by Act of Congress" does not allow a federal court to enjoin state proceedings based on the inferred intent of federal legislation. *Mitchum*, relied upon by McFarland, is inapposite. *Mitchum* merely recognized that, in the absence of language expressly

authorizing an injunction of state court proceedings, an injunction may nonetheless come within the first exception "if there exists sufficient evidence in the legislative history that *Congress recognized and intended the statute to authorize* injunction of state court proceedings." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. at 633 (plurality opinion) (emphasis added).[3] The fact that important federal policies may be fostered by the statute under which the injunction is sought is insufficient, by itself, to bring it within the first exception. *Id.* at 636 (plurality opinion). Thus, an inferred intent to provide for injunctive relief, derived solely from the fact that such relief arguably supports federal policies underlying the statutory provisions, does not constitute an "express authorization" in the context of the first exception. *Id.* at 636, 639 (plurality opinion).

McFarland likewise misperceives the second, "necessary in aid of jurisdiction," exception. The authority to order injunctive aid to potential jurisdiction "finds roots in traditional concepts of the *relationship between inferior and superior courts of the same judicial system* . . . ." *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. 511, 519 n.5 (1955) (emphasis added). The second exception does not authorize injunctive relief to preserve a case or controversy if that case or controversy is not then being litigated at some stage of the federal adjudicatory process. *Id.*; *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. at 642 (plurality opinion) (the concurring Justices expressed no disagreement with the plurality's analysis of the "aid of jurisdiction" point, which was necessary to the judgment in which they concurred).

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[3] The concurrence neither expressly nor necessarily rejected the plurality's understanding of *Mitchum* in concluding that, under narrowly limited circumstances not present in *Vendo*, Section 16 of the Clayton Act would constitute an express exception to the Anti-Injunction Act.

B. *Habeas Corpus Act*

The jurisdiction of a federal habeas court to stay a state's imposition of a death sentence is controlled exclusively by the plain meaning of 28 U.S.C. § 2251, which provides in pertinent part:

> A judge or justice of the United States *before whom a habeas corpus proceeding is pending*, may, before final judgment or after final judgment of discharge, pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

(emphasis added).

" [W]here, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms.'" *West Virginia University Hospitals v. Casey*, 111 S.Ct. 1138, 1147 (1991), *citing United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), *citing Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 138 n.3 (1981). This is particularly true where the language is supported by consistent judicial interpretation. *Maine v. Thiboutot*, 448 U.S. 1, 6 n.4 (1980). It is only necessary to look to the legislative history of a statute in situations, unlike this one, where the statutory language is unclear. *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *United States v. Turkette*, 452 U.S. 576 (1981).

In this case, there can be no basis for disregarding the plain meaning of § 2251. The import of the statutory language is clear, and that understanding is uniformly supported by the legislative history and existing decisional authority. There is no support for McFarland's arguments that § 2251 provides for the entry of a stay when a habeas petition raising constitutional

grounds for relief is not pending before the Court.[4] Further, as discussed in section I, C, *infra*, McFarland's contention that 21 U.S.C. § 848 (q) modifies the express limitations of § 2251 and allows stays of execution under such circumstances is untenable.

The provisions of the Habeas Corpus Statute, 28 U.S.C. § 2241, *et. seq.* and the Rules Governing Section 2254 cases ("the habeas rules") make it plain that, in order for a habeas corpus proceeding to be pending, a habeas petitioner must have filed a petition identifying claims of constitutional dimension and alleging the factual support for such claims. Sections 2241 and 2242 anticipate that a habeas corpus proceeding will be initiated by the filing of a habeas corpus application.[5] Rule 2 of the

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[4] "Pending" is defined in Webster's New Twentieth Century Dictionary as "remaining undecided; not determined; not established."

[5] 28 U.S.C. § 2241 (d) provides:

> Where an *application for writ of habeas corpus* is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the *application may be filed* in the district court for the district . . . .

28 U.S.C. § 2242 provides:

> Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.
>
> It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

habeas rules specifies that an application shall be in the form of a petition in which the petitioner is required to identify all available grounds of relief and set forth the factual support for each of the grounds. *See also* 28 U.S.C. § 2242. Rule 3 specifies that the petition shall be filed and entered on the docket by the clerk of the district court only after having ascertained that the petition appears on its face to comply with the requirements of Rules 2 and 3, including the requirement of fact pleading set forth in Rule 2. Where these requirements have not been met, there is no proceeding before the federal habeas court that would justify the imposition of a stay under § 2251.

The appropriateness of the conclusion of the courts below that there was no jurisdiction to enter a stay in McFarland's case is informed by reference to the Federal Rules of Civil Procedure. Habeas corpus is a civil proceeding governed by the habeas rules, and the Rules of Civil Procedure apply only "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." Fed. R. Civ. P. 81 (a) (2); Rule 11, 28 U.S.C. fol. § 2254; *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 269 (1977). Although the Federal Rules of Civil Procedure do not require the fact pleading required by § 2242 and Rule 2 of the habeas rules, the motion for stay of execution and appointment of counsel filed in this case would be insufficient to commence a civil action even under the Rules of Civil Procedure. Rule 3 of the Rules of Civil Procedure provides that "[a] civil action is commenced by filing a complaint with the court." A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 81 (a)(2). Thus, in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), the filing of a right-to-sue letter did not constitute commencement of action within the meaning of Rule 3 of the Federal Rules of Civil Procedure. "Although Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings 'give the defendant fair notice

of what the plaintiff's claim is and the grounds upon which it rests.'" *Baldwin County Welcome Center v. Brown*, 466 U.S. at 149 & n.3. Thus, the conclusion that a habeas proceeding is pending only upon the filing of a petition is consistent with the Federal Rules of Civil Procedure.

The Court's federal habeas precedent reinforces the conclusion that, in order for there to be a pending federal habeas proceeding endowing a court with jurisdiction to stay state proceedings, a petition identifying constitutional grounds for relief must have been filed. In a series of cases addressing the authority of "next friends" to pursue federal habeas relief on behalf of death-sentenced inmates, the Court addressed jurisdictional concerns. "[F]ederal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings only in specified circumstances. Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power." *Demosthenes v. Baal*, 110 S.Ct. 2223, 2226 (1990). Article III gives the federal courts jurisdiction only over "cases and controversies." A federal court is powerless to create its own federal jurisdiction and cannot employ untethered notions of public policy to expand jurisdiction. *Whitmore v.* Arkansas, 495 U.S. 149, 155-56, 161 (1990). If a federal habeas petitioner, such as McFarland, entirely fails to allege a constitutional infirmity in the conviction or sentence of the state convicting court, federal habeas jurisdiction simply does not adhere.

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), and *Autry v. Estelle*, 464 U.S. 1 (1983), the Court addressed the showing of a denial of a constitutional right that a death-sentenced inmate must demonstrate to be entitled to a stay of execution. The *Barefoot* Court upheld the Court of Appeals' expedited consideration of the habeas appeal and denial of a stay even though the district court's grant of a certificate of probable cause indicated that the petitioner had made a substantial showing of the denial of a federal right. Where an appeal is frivolous, the *Barefoot* Court noted that it is entirely appropriate

to deny a stay and dismiss the appeal after a hearing on the motion for a stay. *Id.* at 894. Further, where a second or successive petition fails to allege new or different grounds for relief, or the failure to assert the claims in a prior petition constitutes an abuse of the writ, the granting of a stay should reflect the presence of substantial grounds upon which relief might be granted. *Id.* at 895; *see also Autry v. Estelle*, 464 U.S. 1 (declining to adopt rule calling for an automatic stay, regardless of the merits of the claims presented, where the applicant is seeking certiorari review of the denial of his first federal habeas corpus petition). Since the denial of a stay is appropriate under the circumstances delineated in *Barefoot*, then it follows that it is appropriate where, as here, the individual requesting a stay to pursue federal habeas review has not identified a constitutional infirmity in his conviction or sentence. Federal habeas review exists only to review errors of constitutional dimension. *Smith v.* Phillips, 455 U.S. 209, 221 (1982); *Townsend v. Sain*, 372 U.S. 293, 312 (1963); *see also* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 4263 at 315-16 (1988 ed).

While it is not necessary in this case to look beyond the plain language of § 2251, the legislative history of the Habeas Corpus Act further supports the conclusion that an individual must have filed a petition identifying constitutional infirmities in his conviction or sentence for a federal court to have jurisdiction to stay an execution. Two distinct aspects of the legislative history support this understanding: (1) the imposition in 1908 of the requirement of a certificate of probable cause to appeal a district court's denial of federal habeas relief and (2) the repeal in 1934 of the provision for automatic stays of state court proceedings.

The Habeas Corpus Act of 1867 imposed an automatic stay of state court proceedings pending the district court's disposition of the federal habeas action and any appeals. *Barefoot v. Estelle*, 463 U.S. 892 n.3 (citations omitted). "In 1908, concerned with the increasing number of frivolous habeas

corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process, Congress inserted the requirement that a prisoner first obtain a certificate of probable cause to appeal before being entitled to do so." *Id.* The Committee report described the circumstances leading to the amendment.

> The appeals are prosecuted without reference to the question as to whether there is any merit to the appeal, and as the statutes now stand the right of appeal is absolute.
>
> [T]he right of appeal is absolute, and it furnishes persistent and litigious defendants with an opportunity to get the delay of from one to two years when there is absolutely no merit in their contention.

H.R. Rep. No. 23, 60th Congress, 1st Session 1-2 (1908). A statement made by Representative Littlefield on the floor of the House is apropos to the situation before the Court in this case:

> [A] man might wait so late that the capital sentence would be executed on his client because he did not have time to get his application to the court, but if he exercises ordinary diligence and does not wait until about the last minute, and then take advantage of this statute and prosecute his appeal, that nobody can now prevent, he would have no difficulty in having his rights protected. It does not change the statute in that respect at all so far as the mode of procedure is concerned.

32 Cong. Rec. 608-9 (January 11, 1908).

In 1934, the Habeas Corpus Act was amended to eliminate the automatic stay provision and to authorize federal

judges to grant stays in the exercise of their discretion. Again the purpose of the amendment was to deprive defendants in state courts of a "powerful weapon to delay proceedings . . . and possibly defeat the ends of justice." 78 Cong. Rec. 12,366 (June 18, 1934).

C. *Anti-Drug Abuse Act*

1. Implied authority to enter a stay may not be derived from § 848 (q) where express provisions exist in § 2251.

There is no basis for construing the provisions for appointment of counsel embodied in 21 U.S.C. § 848 (q) as authorizing federal courts to enter stays of execution when the conditions of 28 U.S.C. § 2251 are not satisfied. Unlike § 2251, § 848 (q) does not expressly authorize injunctive relief or address the circumstances under which a stay would be appropriate. Further, there is no legislative history or other authoritative evidence to support McFarland's inference that, in enacting § 848 (q), Congress necessarily envisioned that the federal habeas courts would be empowered to stay executions in order to appoint counsel pursuant to § 848 (q). Indeed, such intent cannot logically be imputed to the enactment of § 848 (q). The effectiveness of the provisions for appointment of counsel do not depend on a federal habeas court's ability to stay an execution, but rather depend upon a petitioner's timely request for appointment.[6]

Even if it is assumed, *arguendo*, that authority to enter a stay could be inferred from the provisions of § 848 (q), which it cannot, the specific statutory grant of authority in 28 U.S.C. § 2251 to enjoin state court proceedings must control over the

[6] This is true regardless whether § 848 (q) is construed as proposed by McFarland to allow counsel to be appointed prior to the filing of a habeas petition.

provisions of § 848 (q). "Where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of the enactment." *Crawford Fitting Company v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (emphasis of Court); *Board of Governors v. MCorp Financial*, 112 S.Ct. 459, 465 (1991); *Morton v. Mancari*, 417 U.S. 535, 550 (1974).

Moreover, when, as here, "two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. at 551. Contrary to McFarland's characterization, the provisions of § 848 (q) for appointment of counsel are not inconsistent with or defeated by the requirement of § 2251 that there be a pending habeas proceeding before a stay can be entered. As discussed *infra*, regardless whether § 848 (q) is construed to require a pending habeas petition raising substantial constitutional issues before counsel may be appointed, the § 848 (q) provisions are not frustrated by the § 2251 prerequisites for entry of a stay, but by the failure of a petitioner such as McFarland to utilize available processes in a timely fashion.

Underlying McFarland's analysis throughout is the assumption that a death-sentenced inmate is entitled to wait until immediately before a scheduled execution date to pursue state and federal habeas relief. It is only in light of this unwarranted assumption that the appointment of counsel under § 848 (q) can be implicated by the failure to authorize federal courts to stay state executions when there is no pending federal habeas petition. "What [McFarland] asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." *West Virginia University Hospitals v. Casey*, 111 S.Ct. at 1148, *quoting Iselin v. United States*, 270 U.S. 245, 250-51 (1926).

2. Section 848 (q) does not constitute an express exception to the Anti-Injunction Act.

If Congress had not enacted the express provisions of § 2251 establishing the authority of federal courts to enter a stay, § 848 (q) nonetheless could not be construed as constituting an exception to the Anti-Injunction Act's absolute prohibition. Contrary to the argument advanced by McFarland, § 848 (q) does not constitute an "express exception" under the analysis of *Mitchum v. Foster*. In *Mitchum v. Foster*, the Court applied a two-part test before concluding that 42 U.S.C. § 1983 constituted an "express exception": whether an Act of Congress (1) clearly creating a federal right or remedy enforceable in a federal court of equity (2) could be given its intended scope only by the stay of a state court proceeding. 407 U.S. at 238. Section § 848 (q) satisfies neither prong of the *Mitchum* standard.

Federal district courts and circuit courts of appeal do not sit in direct review of state convictions. *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. at 296. Rather, they are limited to the scope of federal habeas review permissible under § 2254. It follows that whether § 848 (q) is an enforceable federal right or remedy must be determined in this context. Unlike 42 U.S.C. § 1983, which is directed at state action and expressly authorizes a "suit in equity" to redress "the deprivation," under color of state law, "of any rights, privileges or immunities secured by the Constitution . . .", § 848 (q) is a procedural rule applicable only to federal proceedings. Further, unlike § 1983, § 848 (q) cannot be construed as expressly providing for a cause of action, whether for injunctive relief or otherwise.

While the scope of review under 28 U.S.C. § 2254 extends to claims that the person is in "custody in violation of the Constitution or laws or treaties of the United States," § 848 (q) is not a law enforceable under § 2254. As the Court has

recognized, habeas review of state court convictions and sentences is limited to review for error of constitutional dimension. *Smith v. Phillips*, 455 U.S. at 221; *Townsend v. Sain*, 372 U.S. at 312 (1963); *see also* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 4263 at 315-16. In order to be cognizable under § 2254, a "claimed error of *law* [must be] 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *Davis v. United States*, 417 U.S. 333, 346 (1974) (emphasis added) (provisions of § 2255 equated with those of § 2254), *quoting Sunal v. Large*, 368 U.S. 424, 428 (1962). In other words, as with errors of state law,[7] violations of federal law must rise to the level of a due process violation. *Davis v. United States*, 417 U.S. at 346. However, there is no constitutional right to the statutory habeas remedy set forth in § 2254[8] or to the assistance of counsel in federal habeas

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[7] *Smith v. Phillips*, 455 U.S. at 221; *see also Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

[8] Defendants have no constitutional right even to have the constitutionality of their convictions reviewed on direct appeal. *Abney v. United States*, 431 U.S. 651, 656 (1977); *McCane v. Durston*, 153 U.S. 684 (1894). The federal habeas review guaranteed by the Constitution is not the review established by statute and set forth in 28 U.S.C. § 2254. The writ mentioned in the Suspension Clause, which refers to "[t]he Privilege of the Writ of Habeas Corpus," Art. I, § 9, Cl. 2, was merely the common law writ as it existed at the time the Constitution was drafted. The writ was not considered "a means by which one court of general jurisdiction exercises post-conviction review over the judgment of another court of like authority." *See Swain v Presley*, 430 U.S. 372, 385 (1977) (Burger, C.J., concurring); *quoting* Oaks, *Legal History in the High Court--Habeas Corpus*, 64 MICH. L. REV. 451 (1966); *Stone v. Powell*, 428 U.S. 465, 474-75 (1976); *United States v. MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion); Friendly, *Is Innocence Irrelevant? Collateral Attack on*

review. *McCleskey v. Zant*, 111 S.Ct. 1454, 1471 (1991) (no constitutional right to counsel in federal habeas corpus); *see also Coleman v. Thompson*, 111 S.Ct. 2546, 2566 (1991) (no right to counsel in state post-conviction proceedings); *Murray v. Giarratano*, 492 U.S. 1 (1989) (same), *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (same). Therefore, it follows that the failure to provide counsel pursuant to § 848 (q) does not implicate constitutional concerns that would be cognizable in federal habeas review and, thus, cannot establish a federal right or remedy enforceable against the states by injunctive relief.[9]

As discussed *supra*, the "intended scope" of federal legislation does not render specific and long-standing statutory provisions of § 2283 inoperative even in those instances in which important federal policies are fostered by the statute under which the injunction is sought. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. at 639 (plurality opinion). This rule necessarily is of even

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Criminal Judgments, 38 U. CHI. L. REV. 142, 170 (1970). The Suspension Clause does not require the federal or state governments to establish appellate or post-conviction mechanisms as part of the criminal process. Federal habeas review was first extended to state court convictions by the Habeas Corpus Act of 1867 and gave federal courts the "power to grant the writ of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States." Teel, *Federal Habeas Corpus, Relevance of the Guilt Determination Process to Restriction on the Great Writ*, 37-1 SW.L.J. 519, 521 (1983). It was not until this century that plenary federal review of state court convictions became a common place feature of habeas corpus. *See Wainwright v. Sykes*, 433 U.S. 72 (1977).

[9] Further, because McFarland is not in custody pursuant to 848 § (q), it cannot provide an independent basis for the Court's entry of a stay under § 2251.

greater force where, as here, the proponent for injunctive relief relies upon a statute that does not purport to authorize such relief and where, as in § 2251, Congress has otherwise expressly set forth the circumstances in which a stay may be entered.

In the absence of an express provision, the second prong of the *Mitchum* test requires "sufficient evidence in the legislative history that Congress recognized and intended the statute to authorize injunction of state court proceedings." *Vendo Co. v. Lektro-Vend Corp.*, at 633 (plurality opinion).[10] Where, as here, there is no legislative history evincing Congressional intent to authorize injunctions of state court proceedings, there is no express exception under *Mitchum*.

Even if it is assumed, *arguendo*, that McFarland is entitled under *Mitchum* to freely construe § 848 (q) to infer intent and that McFarland correctly discerns that the intent of Congress, as revealed by the language of § 848 (q), was "that the assistance of counsel be afforded at every stage of a habeas proceeding in which the expertise of such counsel is particularly

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[10] As the plurality observed in *Vendo Co. v. Lektro-Vend Corp.*:

> Presumptively, all federal policies enacted into law by Congress are important, and there will undoubtedly arise particular situations in which a particular policy would be fostered be the granting of an injunction against a pending state-court action. If we were to accept respondents' contention that § 16 could be given its "intended scope" only by allowing such injunctions, then § 2283 would be completely eviscerated since the ultimate logic of this position can mean no less than that virtually *all* federal statutes authorizing injunctive relief are exceptions to § 2283 statutes.

433 U.S. at 636 (original emphasis).

important" (McFarland's brief at 24), the intent to provide counsel cannot result in implied or derivative authority to enter a stay. If authority exists under § 848 (q) to appoint counsel and provide other pre-litigation assistance prior to the filing of a petition, then McFarland did not have to wait until an execution date was scheduled, much less until 5 days before the scheduled date, to file a request for counsel pursuant to § 848 (q).

D. *All Writs Act*

The All Writs Act, 28 U.S.C. § 1651, did not give the district court jurisdiction to stay McFarland's execution in order to appoint counsel. The Act, in pertinent part, provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Relying on *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985), and *Harris v. Nelson*, 394 U.S. 286 (1969), McFarland contends that the All Writs Act authorizes the district court to stay the impending execution of an indigent inmate who is unable to prepare and file a petition, thereby filling a gap in the federal court's power. Contrary to McFarland's tortured interpretation of this Court's precedent, the All Writs Act has not been utilized to confer jurisdiction on a federal district court where there exists no case or controversy.

Because Congress in 28 U.S.C § 2251 specifically limited the federal courts' jurisdiction to stay an execution, jurisdiction cannot be derived from the All Writs Act. "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority and not the All Writs Act, that is controlling." *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. at 43. In *Pennsylvania Bureau of Correction*, the Court held that, because there was a specific statute encompassing the duty of the custodian to transport a prisoner, in the absence of

exceptional circumstances, the All Writs Act did not authorize the federal district court to order the marshals to transport state prisoners to the federal courthouse to testify in a 42 U.S.C. § 1983 action. The Court distinguished that case from the cases of *Harris v. Nelson, supra, United States v. New York Telephone Co.*, 434 U.S. 159 (1977), and *Price v. Johnston*, 334 U.S. 266 (1948), explaining that in the latter three cases, the All Writs Act was necessary "to fill statutory interstices." 474 U.S. at 42 n.7. More specifically, in that trio of cases, no statute provided for the action requested of the federal district court. Here, as in *Pennsylvania Bureau of Correction*, a statute, § 2251, specifically delineates the circumstances in which the federal courts have jurisdiction to order the requested relief, and resort to the All Writs Act is unprecedented and unwarranted.

Neither Congress nor this Court has envisioned that § 1651 would, in and of itself, confer jurisdiction on a federal district court. The language in the All Writs Act, which provides that a federal court "may issue all writs necessary or appropriate in aid of their respective jurisdictions," vests power in a federal court to issue orders "as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of *jurisdiction otherwise obtained*." *United States v. New York Telephone Co.*, 434 U.S. at 172 (emphasis added).[11] The All Writs Act cannot supply federal courts with an independent source of subject matter jurisdiction. "[I]t [is] settled beyond controversy, until Congress shall otherwise provide, that circuit courts of the United States have no power to issue a writ of mandamus in an original action brought for the

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[11] Similarly, regarding the language in the second exception set forth in the Anti-Injunction Act, 28 U.S.C. § 2283 ("where necessary in aid of its jurisdiction,"), the Court has stated that "non-existent jurisdiction therefore cannot be aided." *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. at 519.

purpose of securing relief by the writ, and this result is not changed because the relief sought concerns an alleged right secured by the Constitution of the United States." *Covington & Cincinnati Bridge Co. v. Hager*, 203 U.S. 109 (1906). Thus, the All Writs Act (§ 1651 and its predecessors) is not a jurisdictional statute, but rather authorizes the federal court to issue writs necessary for the exercise of a jurisdiction already existing. *United States v. New York Telephone Co.*, 434 U.S. 159 and *Stern v. South Chester Tube Co.*, 390 U.S. 606, 608 (1968) (28 U.S.C. § 1651); *Price v. Johnston*, 334 U.S. 266 (1948) and *Adams v. United States ex rel. McCann*, 317 U.S. 269, 272-73 (1942) (Section 262 of the Judicial Code, 28 U.S.C. § 377); *In re Commonwealth of Massachusetts*, 197 U.S. 482 (1905) (Section 716 of the Revised Statutes, U.S. Comp. Stat. 1901, p. 580).[12]

Relying on *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966), McFarland nevertheless argues that the All Writs Act grants a federal district court the power to enjoin the execution of a state prisoner "in aid of" that court's *prospective* jurisdiction. McFarland's reliance is misplaced. In *Dean Foods*, the Court held that a court of appeals, which had ultimate

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[12] While the legislative history of the All Writs Act is "scant," *Pennsylvania Bureau of Correction v. United States Marshals*, 474 U.S. at 41, the changes that Congress has made in the phraseology of § 1651 and its predecessors have not been substantive. *Id.; United States v. New York Telephone Co.*, 434 U.S. at 173; *see e.g., Adams v. United States ex rel. McCann*, 317 U.S. 269, 272-73 (1942) ("Uninterruptedly from the first Judiciary Act (Section 14 of the Act of September 24, 1789, 1 Stat. 73, 81) to the present day (Section 262 of the Judicial Code, 28 U.S.C. § 377, 28 U.S.C.A. § 377), the courts of the United States have had powers of an auxiliary nature `to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.'")

jurisdiction to review orders issued by the Federal Trade Commission, could grant the Commission's request for a temporary injunction to preserve the "controversy" pending before that agency. *See Sampson v. Murray*, 415 U.S. 61, 76-77 (1974). Here, in sharp contrast, McFarland did not file a habeas petition in the district court alleging specific constitutional deficiencies in his conviction or sentence, and thus, as previously discussed, there was no case or controversy to confer jurisdiction on the district court. *See Whitmore v. Arkansas*, 459 U.S. 149.

Dean Foods simply stands for the proposition that when a federal court has an obligation to review an *inferior* adjudicatory body's decision on the merits, the court may invoke the All Writs Act to protect its future jurisdiction to perform that obligation. Indeed, referring to the All Writs Act, this Court has observed "it has never been authoritatively suggested that this example of injunctive aid to a potential jurisdiction, which finds roots in traditional concepts of the relationship between inferior and superior courts of the same judicial system, has any relevance where the offending action sought to be enjoined is insulated by two intervening and essentially unrelated systems, one of an administrative rather than judicial nature, the other the manifestation of a distinct sovereign authority." *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. at 519 n.5.

A federal district court, unlike this Court, does not have potential appellate jurisdiction over federal questions previously raised in state court. *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers*, 398 U.S. at 296; *see also Smith v. Phillips*, 455 U.S. at 221 ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."). Here, assuming that any constitutional claim in a "future" federal petition will have been exhausted in the state courts pursuant to 28 U.S.C. § 2254(b), any previous jurisdiction over a case or controversy between McFarland and the state would lie in the state courts, not the federal district court.

Further, *Dean Foods* did not involve the Anti-Injunction Act and does not lend any support for the proposition that the invocation of the All Writs Act enables a stay applicant to circumvent either the absolute prohibition in the Anti-Injunction Act or the specific grant of authority in § 2251 regarding the stay of state court proceedings. In *Dean Foods*, the preliminary question was whether, in the *absence* of express statutory authority, the Commission could petition the court of appeals for injunctive relief. *See Sampson v. Murray*, 415 U.S. at 76 n.33; 384 U.S. at 608. The difference between that type of case and one involving an express prohibition on injunctions, as in the instant case, is critical. *See Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987); *citing Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

McFarland met neither requirement implicit in *Dean Foods*. First, no petition alleging constitutional error had been filed, and thus, no case or controversy existed in the federal district court. Second, the federal district court did not have prospective *appellate* jurisdiction to review any constitutional claim previously raised in the state court proceedings. Clearly, if the "necessary in aid of jurisdiction" language employed in the Anti-Injunction Act and the All Writs Act were extended in the manner proposed by McFarland to cases that had not yet entered the federal adjudicatory process and to unidentified, prospective controversies, the Anti-Injunction Act, as well as the express limitations of §2251, would be rendered meaningless.

McFarland also relies on *Woodard v. Hutchins*, 464 U.S. 377 (1984), and *Lenhard v. Wolff*, 443 U.S. 1306 (1979), for the proposition that the federal district court could have stayed his execution pursuant to §1651. In *Woodard v. Hutchins*, a circuit judge had jurisdiction to consider the inmate's application for a stay of execution pursuant to § 1651. In that case, unlike the case at bar, the stay applicant had filed a federal habeas petition pursuant to § 2254 in the district court alleging constitutional violations. The district court had denied a stay but did not rule on the petition. *Id.* at 381 (Brennan, J., dissenting).

Accordingly, there was an existing case or controversy that the court of appeals had ultimate jurisdiction to review, and the circuit judge therefore had prospective appellate jurisdiction of the *pending case*. Likewise, in *Lenhard v. Wolff*, 443 U.S. 1306, 1309 (1979), the death-sentenced inmate's attorneys, acting as next friend, had petitioned the federal courts for habeas relief alleging "substantive constitutional arguments," and thus, there was an issue before the Court.[13]

Finally, McFarland incorrectly argues that the All Writs Act grants the district court authority to appoint counsel to prepare a petition for federal habeas corpus relief. There are two specific provisions for federal courts to appoint counsel, § 848(q) and 18 U.S.C. § 3006A(a). As previously set forth, the All Writs Act pertains to areas not otherwise covered by statute, *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. at 43, and therefore is inapplicable.

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[13] McFarland notes that this Court, in a memorandum opinion, denied a petition for writ of certiorari "without prejudice to [file] an application for a writ of habeas corpus in the appropriate United States District Court." *Land v. Florida*, 377 U.S. 959 (1964). The Court extended the previously imposed stay of execution for 60 days to allow the petitioner to file a federal petition and ordered that if the federal petition were filed, the stay would be continued pending disposition of the petition. It does not appear from the brief opinion that the Court's authority to grant such a stay was in question. In any event, it does not follow that simply because this Court has the power to grant an extraordinary writ, a federal district court likewise does. *Cf. Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers*, 398 U.S. at 296 ("Unlike the Federal District Court, this Court does have potential appellate jurisdiction over federal questions raised in state court proceedings, and that *broader jurisdiction* allows this Court correspondingly *broader authority to issue injunctions* 'necessary in aid of its jurisdiction.'") (emphasis added).

II. Enjoining a state execution when no constitutional infirmity in the conviction and sentence has been identified is contrary to long standing concerns of federalism and comity.

Even if there were authority to enjoin an execution under the circumstances presented here, where no constitutional infirmity has been identified in the conviction or sentence, it would impermissibly impinge on the traditional interests of federalism and comity that permeate the Court's habeas corpus jurisprudence. Where no constitutional infirmity has been identified, the imposition of a state's presumptively valid death sentence should not be stayed to allow a petitioner to raise as yet unidentified claims in an as yet uninitiated action. The entry of a stay under such circumstances transforms federal habeas review into an event at least co-equal in importance to the trial itself.

The criminal trial is the main event at which "[t]o the greatest extent possible all issues which bear on th[e] charge should be determined . . . ," *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977), and direct review is the principal avenue for challenging a conviction. *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1719 (1993). Historically, habeas review is the extraordinary remedy, a safeguard to afford relief to those grievously wronged--those whose convictions violate "fundamental fairness." *Id.* at 1719, 1721.

> [D]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review--which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari--comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is

> secondary and limited. Federal courts are not forums in which to relitigate state trials.

Barefoot v. Estelle, 463 U.S. at 887. The concern that "federal intrusions into state criminal trials frustrate . . . the States' sovereign power to punish offenders" is only enhanced where, as here, that intrusion is not based on constitutional concerns. *Brecht v. Abrahamson*, 113 S.Ct. at 1720.

Nonetheless, advocates on behalf of death-sentenced inmates seek to transform federal habeas review into the "main event," in which not only to relitigate the trial itself, but in which every facet of the pre-trial and trial process is investigated for error, regardless whether there is any indication that there was in fact error and regardless how tangential any error may be to fundamental fairness or the accuracy of the determinations of guilt or sentence. For this reason, the time and resources spent in collateral review litigation are grossly disproportionate to the limited purpose of such review and normally far exceed the time allotted to trial preparation and the trial itself.

In his delineation of the roles of counsel and experts and the time necessary to pursue federal habeas review, McFarland clearly envisions federal habeas review as the main event. McFarland not only identified 120 days as the necessary amount of time to adequately prepare a writ application, JA 17, he also identifies as essential to such review the assistance of "investigators, social workers, mitigation experts, psychologists and psychiatrists, firearms and ballistics experts, pathologists, serologists, trace evidence experts, and others who can identify, probe, and draw conclusions regarding relevant facts through their expertise." McFarland's brief at 27.

If pre-petition stays were routinely entered upon request only days before a scheduled execution date without requiring a death-sentenced inmate to demonstrate that there exists a potential constitutional infirmity in his conviction or sentence, there would be no incentive to initiate state and federal habeas

review in a timely fashion, regardless how long a state waited to set an execution date. Indeed, McFarland's motions for appointment of counsel and a stay are clearly based on the presumption that collateral review need not be initiated until an execution date has been set and that pre-execution stays should be routinely entered.

III. The so-called "crisis in representation" of death-sentenced inmates in Texas results from a deliberate manipulation of existing process.

The issue before the Court is whether a federal habeas court has jurisdiction to stay an execution in order to appoint counsel for a death-sentenced inmate when that inmate has not filed a petition identifying error of constitutional dimension in his trial or sentencing procedure. While the resolution of the jurisdictional issue is strictly governed by the Anti-Injunction Act and 28 U.S.C. § 2251 and may not be influenced by equitable considerations, McFarland attempts to sway the Court's decision by delineating a "crisis in representation" of Texas death row inmates. This so-called "crisis in representation" is nothing less than a deliberate manipulation of existing procedures. *See McFarland v. Collins*, 8 F.3d 256, 258 (5th Cir. 1993) (Jones, J., dissenting) ("Contrary to the representation of counsel for the Texas Resource Center, this case became a manufactured procedural emergency long before it reached federal court.").

McFarland attributes his failure to identify and brief constitutional grounds for relief in a federal habeas petition to (1) the lack of a singular, routine procedure for securing counsel to assist death-sentenced inmates in state habeas review and (2) the United States District Court's failure in *Gosch v. Collins*, No. SA-93-CA-731, slip op. (W.D. Tex. September 16, 1993), to stay a scheduled execution and appoint counsel upon the Center's filing of a "perfunctory petition" raising "one thin claim of a Constitutional defect." *See Gosch v. Collins*, No. 93-8635, slip op. (5th Cir. September 16, 1993) (attached hereto as

Appendix A). According to McFarland, a petition raising one ground for relief was filed in *Gosch* merely to give the district court jurisdiction to enter a stay and appoint counsel. McFarland reasons that, when the *Gosch* district court denied relief on the merits of that claim, this procedure for endowing the district court with jurisdiction to enter a stay and appoint counsel was no longer viable and he necessarily had to approach the federal habeas court without raising a constitutional basis for relief or risk having a subsequent petition dismissed for abuse of the writ. However, neither of the factors identified by McFarland explains his conduct or the conduct of the Center in this case.

A. *Procedures for securing counsel to assist death-sentenced inmates in state habeas review*

In Texas, counsel to assist death-sentenced inmates in pursuing collateral review are either appointed pursuant to Article 1.051 of the Texas Code of Criminal Procedure or are recruited by the Center. Rule 233 of the Texas Rules of Appellate Procedure authorizes a trial court to modify or withdraw an execution date if a state habeas application is pending. *Ex parte Lockart*, ___ S.W.2d ___, No. 25-669-01, slip op. (Tex.Crim.App. November 22, 1993) (attached hereto as Appendix B).

Generally, despite the apparent limitations of Texas Rule of Appellate Procedure 233, trial courts routinely withdraw or modify execution dates to allow time for recruited or appointed counsel to file an original or amended state writ application. In letters similar to the October 21, 1993, letter to the Texas Court of Criminal Appeals, JA 24-29, the Center identified 18 inmates as facing execution dates without the assistance of counsel between November 1, 1993, and January 31, 1994. Of these

inmates, the execution dates of 14 were modified or withdrawn by the trial court to facilitate state habeas review.[14] Appendix C.

1. McFarland's case

Tarrant County assistant district attorneys assured the Center that the District Attorney would not oppose a stay if a state habeas petition was filed. As Judge Jones noted in her dissent to the dismissal of the appeal of McFarland's first petition (and second tour of the federal courts): "Why the Resource Center never chose to invoke this eminently reasonable option [filing a petition] either in either state or federal court until 5:45 p.m. on the eve of execution is a complete mystery . . . ." *McFarland v. Collins*, 8 F.3d at 259.

Given the resources of the Center--a budget of between $2,700,000 and $4,100,000 and a staff of at least fifteen attorneys--the assertion that they were personally unable to assist McFarland in formulating a state habeas application in the allotted time period is hardly credible. See Amicus Brief of Bexar, Dallas, Harris, and Tarrant Counties. Certiorari review of the Texas Court of Criminal Appeals' decision on direct appeal was denied on June 6, 1993, and on August 16, 1993, McFarland's execution was scheduled for September 23, 1993. On September 20, the September 23 execution date was withdrawn and McFarland's execution was rescheduled for October 27, 1993, more than four months following the denial of certiorari review. Thus, the Center had been afforded precisely the amount of time, 120 days, that it routinely asserts is necessary to recruit counsel. At the time of McFarland's second scheduled execution date, the Center had been connected with his case for ten months. Moreover, although McFarland

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[14] In the past five years, on the average, 21 individuals have been assigned to death row each year. The Texas Court of Criminal Appeals affirmed 31 capital convictions and sentences in 1992 and 59 in 1993. Appendix D.

executed his *in forma pauperis* affidavit on September 21, 1993, he did not file a state writ application and raised only one ground for relief in the petition filed 35 days later in federal court. *McFarland v. Collins*, 8 F.3d at 259 n.3.

If the Center did not anticipate being able to recruit counsel in the time allowed by the court and was itself actually unable to provide initial representation, then it was incumbent upon Center attorneys to approach the convicting court in a timely and procedurally correct manner and request appointment of counsel. They did not do so. Rather, they waited until four days before the first scheduled execution date, and more than three months after the date was set, to approach the trial court by letter. In correspondence addressed by the Center's directors to the convicting court on September 19, 1993, four days before the first scheduled execution date, and on October 16, 1993, eleven days before the second scheduled execution date, the Center asked the convicting court to either appoint counsel or allow it 120 days to recruit counsel and to allow appointed or recruited counsel 120 days to compile a state habeas application. However, a motion to stay or withdraw the execution date was not filed with the clerk of the convicting court. JA 89-90.

McFarland's failure to file a state habeas application cannot even arguably be attributed to the district court's actions in *Gosch*. Had the filing of a perfunctory state habeas petition in the convicting court not resulted in a modification or stay of the execution date, McFarland could have limited his filings in the federal district court to motions for appointment of counsel and a stay of execution.

The Center's conduct in McFarland's case is, at best, unwarranted and unexplainable. As Judge Jones noted:

> It is also a mystery why the first real habeas petition on the merits was filed in federal court rather than state court. Competent litigators in any other area of practice would have reviewed

> their options when the execution date was set in August and would have begun preparing a habeas petition well before the 11th hour.

McFarland v. Collins, 8 F.3d at 259 (Jones J., dissenting).

2. Attempts to reform procedure in state habeas review of capital cases to provide for the appointment of counsel

In the 1993 session of the Texas Legislature, Representative Pete Gallego introduced legislation that would have amended state habeas procedure in capital cases. The legislation, HB 1562, which was passed by the House of Representatives, provided for counsel, who were to be compensated, to be appointed immediately after the entry of judgment to assist death-sentenced inmates in state habeas review. See HB 1562 attached hereto as Appendix E at 2, 11. The final version of the bill provided for a "semi-unitary" procedure in which the state habeas application would be filed 150 days after the State's brief was filed on direct appeal. Appendix E at 3. The final bill also foreclosed the setting of an execution date until after the Court of Criminal Appeals had entered judgment on an initial petition for writ of habeas corpus and required execution dates to be set at least 60 days in advance. Appendix E at 11, 12. The claims raised in a subsequent or untimely petition would be considered only in certain, limited circumstances. Appendix E at 4-6.

HB 1562, which would have eliminated the potential abuse of the system that has now been characterized as a "crisis in representation," was opposed by the organized defense bar, including the Texas Criminal Defense Lawyers Association and the Texas Appellate Practice and Education Resource Center. See Policy Statement of Texas Criminal Defense Lawyers Association and endorsements, attached hereto as Appendix F, and Minutes of the April 14, 1993 meeting of the House Committee on Criminal Jurisprudence attached hereto as

Appendix G at 2, 6. The bill died in the Texas Senate as a consequence of this opposition. See Press Release, Gallego Will Try Again to Eliminate Unwarranted Delays in Capital Murder Cases, attached hereto as Appendix H. On February 8, 1994, Representative Gallego announced his intention to introduce identical legislation in the 1995 session of the Texas Legislature. *Id.*

The Center's opposition to HB 1562 makes clear its motive for the "brinkmanship" in this case. The alleged "crisis in representation" resulted from the Center's manipulation of existing process and intense lobbying that led to the defeat of legislation that would have remedied the potential for such manipulation. Where, as is the case in Texas, the federal government has endowed a public defender organization such as the Center with sufficient resources to assure representation at all phases of state and federal habeas review, such abuse of the system should not be rewarded.

B. *Procedures for securing counsel to assist death-sentenced inmates in federal habeas review*

If it is assumed, *arguendo*, that McFarland correctly characterizes § 848 (q) as authorizing the appointment of counsel in the absence of a pending habeas action, it was incumbent upon the Center, after approaching the trial court in a timely manner, to also approach the federal district court in a timely manner and request the appointment of counsel. In light of the Center's anticipated inability to recruit counsel or provide representation itself, its failure to test its alleged understanding of the operation of § 848 (q) as well as other identified statutory provisions at the first opportunity and the decision to wait until the day of the scheduled execution to seek federal appointment of counsel is again, at best, unwarranted and unexplainable.

McFarland proceeds on the unsubstantiated assumption that death-sentenced inmates, unlike other inmates, are uniformly unable to file rudimentary petitions and initiate the

process of federal habeas review. Pursuant to Habeas Rule 2, district courts must provide prospective petitioners with forms that identify potential grounds for relief. These forms are available to death-sentenced inmates as well as those in the general population. If the Center was unable to assist McFarland in formulating his initial federal petition, it surely was incumbent upon the Center to advise him regarding proceeding *pro se*. Instead of filing a *pro se* petition, McFarland apparently chose to engage in the brinkmanship described above and, as a result, a stay was entered only minutes before his scheduled execution. One can only assume that McFarland's decision to employ the tactics at issue here was made after he was fully advised of his options, including that of initially proceeding *pro se* in federal habeas, identifying arguable bases for relief, and requesting the appointment of counsel.

IV. The authorization of federal courts to stay state executions in order to appoint counsel must not eviscerate the exhaustion requirement or deprive the states of procedural defaults.

If the Court finds that there is jurisdiction to enter a stay and appoint counsel when a petitioner approaches federal habeas review without the assistance of counsel, it should not thereby eviscerate the requirement that a petitioner exhaust his state remedies. There is no constitutional right to state habeas review or the assistance of counsel in such review. Further, as demonstrated, in Texas, any failure in the mechanisms for securing counsel for state habeas review is largely attributable to the machinations of the entities now asserting that the mechanisms are inadequate. Under these circumstances, if a petitioner fails to avail himself of the state collateral review process and seeks the appointment of counsel in federal court, the State must be afforded the opportunity to rely on the exhaustion requirement and compel the petitioner to return to state court. Alternatively, if in a particular case the state collateral process has been rendered inadequate or unavailable, any claims that would be foreclosed by the state's procedural

default doctrine must be correspondingly barred in federal habeas review. *Teague v. Lane*, 489 U.S. 288, 297-98 (1989).

CONCLUSION

For the above reasons, the Director requests that the Court of Appeals' denial of McFarland's motion for stay of execution and appointment of counsel be affirmed.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General
for Criminal Justice

_____
*MARGARET PORTMAN GRIFFEY
Assistant Attorney General
Chief, Capital Litigation Division

_____
STEPHANI A. STELMACH
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

*Counsel of Record

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 93-8635

LESLEY LEE GOSCH,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal
Justice, Institutional Division

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CA-731)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

ORDER

IT IS ORDERED that the application of Petitioner-Appellant Lesley Lee Gosch for stay of execution, which is scheduled to be carried out before sunrise on September 17, 1993, and for a Certificate of Probable Cause (CPC) from this court be and they are hereby DENIED.[1] No useful purpose would be served at this hour in writing separately when, as here, we find the reasoning of the district court in its Order of September 15, 1993, denying Petitioner's application for stay of execution, and in that court's more extensive explication of Petitioner's case in the Memorandum Opinion and Order of even date denying Petitioner's petition for federal habeas relief, to be both correct and complete.

We also affirm the judgment of the district court denying Petitioner's Petition for a Writ of Habeas Corpus, again for the reasons expressed by the district court. Our review of this case from its very beginning reveals that Petitioner has raised but one thin claim of a Constitutional defect with his case and that is his Penry claim. We agree completely with the district court's disposition of that claim, which we too find to be frivolous.

Nonetheless, we have given full consideration to each argument advanced by counsel for Petitioner in briefs and memoranda to the state courts of Texas and to the district court, and have found those arguments to be without sufficient Constitutional merit to justify a stay, a grant of CPC, or habeas relief-again, for the reasons set forth by the district court in its thorough and well reasoned opinion of September 15, 1993.

---

[1] The district court should not have granted CPC once it held Petitioner's Petition for Habeas Corpus to be without merit. We therefore vacate the district court's Order granting CPC under those circumstances. We are convinced that, in the final analysis, Gosch's claims for habeas corpus in this case are indeed frivolous and will not support a grant of CPC.

Moreover, we are not impressed with Gosch's argument that his counsel has not had adequate time to know of and present, at least superficially, other more meritorious issues that might be brought to our attention. As the district court noted, counsel for Petitioner has been generally familiar with this case for some months; we think that is ample time within which to have made at least some bare suggestion of a substantial federal claim if indeed there were any. We are satisfied that there are none.

In adopting the findings and reasoning of the district court for denying habeas relief, we would only repeat this court's oft-stated position, echoing the position of the Supreme Court as set forth in Barefoot v. Estelle, 463 U.S. 880, 888, 103 S.Ct. 3383, 77 L.Ed.2d 1090, 1101 (1983), that, while "federal courts must isolate the exceptional cases where Constitutional error requires retrial or resentencing as certainly and as swiftly as orderly procedure will permit," the district courts must give careful attention to non-frivolous claims of Constitutional error. In that regard, we have specified first that the district courts must review the state court records of those cases in which adequate assessment depends on such review, and that - in order to permit appellate review - the district court is constrained to rule with reasons, issue by issue, on points raised in the petitioner's application for habeas relief. We find that the district court in the instant case has compiled with those constraints.

Even though the relief here sought formally comes to us only at the eleventh hour, we have followed it and studied it closely ever since collateral relief was first sought for Petitioner in the courts of Texas and more recently in the federal district court. As instructed by the Supreme Court in, inter alia, Barefoot, supra, we are not denying the application for stay or the petition for habeas corpus under time constraints that might otherwise pretermit sufficiently careful merits consideration by this court to ensure that justice would not be denied Petitioner solely for lack of time for us to deliberate.

APPENDIX B

EX PARTE MICHAEL LEE LOCKHART
Motion for Stay of Execution
WRIT NO. 25,669-01 From **BEXAR** County

ORDER

This Court affirmed applicant's capital murder conviction and sentence of death on direct appeal. Lockhart v. State, 847 S.W.2d 568 (Tex.Cr.App. 1992). The trial court has scheduled applicant's execution to be carried out on or before sunrise, November 23, 1993.

By the instant motion, applicant seeks a stay of execution in order to allow time for the Texas Resource Center to recruit an attorney to represent him and prepare a post conviction application for writ of habeas corpus under Art. 11.07, V.A.C.C.P.

Applicant first presented his motion for a stay of execution to the convicting court. The trial court denied the relief requested after noting no colorable claim for habeas corpus relief is set forth in the motion and no effort has been made to invoke the trial court's jurisdiction. See Tex.R.App.Pro. Rule 233.

We find we do not have jurisdiction to grant the relief requested by applicant. The granting of such relief would in no manner tend to protect this Court's jurisdiction or enforce a judgment of this Court. See Tex.Const., Art. V, Sec. 5. Therefore, the relief sought is denied.

IT IS SO ORDERED THIS THE 22ND DAY OF NOVEMBER, 1993.

PER CURIAM

En banc
Publish
Overstreet, J., dissents.

EX PARTE MICHAEL LEE LOCKHART
Motion for Stay of Execution
WRIT NO. 25,669-01 From **BEXAR** County

CONCURRENCE TO ORDER

I join the Order of the Court denying applicant's motion for a stay of execution. However, to place this last minute motion in proper prospective, I hereby incorporate the Order of the trial court issued earlier this date in this concurrence.

McCormick, P.J.

En banc
Publish
Delivered: November 22, 1993

No. 88-CR-3197
IN THE 186TH DISTRICT COURT
OF BEXAR COUNTY, TEXAS

STATE OF TEXAS VS.
MICHAEL LEE LOCKHART

ORDER

This defendant has just filed a motion seeking to have this Court issue a stay of execution which is presently set for Tuesday, November 23, 1993. The defendant was convicted and sentenced to death on October 25, 1988.

This conviction was affirmed by the Texas Court of Criminal Appeals and rehearing was denied February 24, 1993. (847 SW2d 568). It appears that rather than seek habeas corpus relief after that date, the defendant elected to file a direct petition with the United States Supreme Court which denied him relief on October 4, 1993. (114 S.Ct. 146; 62 L.Week 3247).

In his motion for stay, the defendant alleges that he desires to file a post conviction application for habeas corpus relief but that he has no counsel. He also alleges he has been assisted in his present claim by attorneys from the Texas Resource Center. The Court has also just received a letter from the Texas Resource Center dated November 17, 1993.

In that correspondence, Mandy Welch, Executive Director of the Texas Resource Center advised that "the Center should provide you with any information it believes to be relevant to the trial court in Mr. Lockhart's future proceedings." She further indicated the duty of the Center was "to recruit and assist counsel for death row inmates in state court."

Finally, she stated: "The existence of an imminent execution date makes it virtually impossible to recruit qualified counsel. Few attorneys will consider taking a case without some

assurance that they can become familiar with the case and provide adequate representation before being faced with an execution date."

ISSUE

The issue that must be considered is whether the defendant has justified his request for a stay to enable counsel to be found to represent him or whether his current status is the result of a deliberate and calculated manipulation of the Texas criminal justice system.

The defendant was represented on direct appeal by court appointed counsel, Mr. Doug Barlow. On December 17, 1992, Mr. Barlow informed Jeffrey Pokorak of the Texas Resource Center (TRC) that he would not file a motion for rehearing with the Texas Court of Criminal Appeals.

FINDINGS OF FACT

The Court finds as facts based on affidavits furnished to the Court and made a part of this record:

1. On December 17, 1992, the same date Mr. Barlow indicated he would not seek rehearing before the Court of Criminal Appeals, Eden Harrington of TRC requested a 45 day extension of time in which counsel could be recruited and file a motion for rehearing. That extension was granted by the Court of Criminal Appeals until Feb. 1, 1993.

2. On January 14, 1993, TRC checked out the appellate record.

3. On February 2, 1993, a motion for rehearing was filed with the Court of Criminal Appeals by Stephanie L. Barclay.

4. On February 8, 1993, the defendant wrote to TRC.

5. On February 10, 1993, the defendant was visited by Phyllis L. Crocker of TRC. On every visit, TRC attorneys signed a form indicated they "affirm that my visit with this inmate is for the purpose of assisting me in matters relating to the attorney-client or attorney-witness relationship and no other purpose."

6. On February 11, 1993, TRC corresponded with the defendant.

7. On February 17, 1993, the defendant corresponded with TRC.

8. On February 23, 1993, TRC corresponded with the defendant.

9. On February 24, 1993, the Court of Criminal Appeals denied rehearing.

10. On February 24, 1993, TRC Corresponded with the defendant.

11. On March 23, 1993, TRC corresponded with the defendant.

12. On May 24, 1993, the defendant corresponded with TRC.

13. On May 25, 1993, the defendant filed a Cert. Petition with the United States Supreme Court, being represented by Daniel Givelber, 400 Huntington Avenue, Boston, MA 02115. The record does not reflect how Mr. Givelber came to be counsel, but the clear implication is that he entered the case through TRC. In his motion, the defendant state: "I was represented in the Supreme Court by Daniel

Givelber. Mr. Givelber's representation was limited to my certiorari proceedings . . ."

14. On July 2, 1993, this court scheduled execution for November 23, 1993. The Court specifically provided almost 5 months for the defendant to initiate post-conviction proceedings.

15. On July 13, 1993, the Institutional Division received the death warrant and notified the defendant.

16. On July 14, 1993, the very next day, the defendant was visited by Lynn Lamberty of TRC with whom he had previously corresponded on May 24, 1993. Neither the defendant nor TRC took any action in the trial Court until almost 5 months thereafter and immediately prior to his scheduled execution date.

17. On October 4, 1993, the Supreme Court denied relief.

18. On October 27, 1993, TRC corresponded with the defendant.

19. On November 5, 1993, the defendant was visited by Elizabeth Cohen of TRC.

20. On November 10, 1993, the defendant was visited by Lynn Lamberty of TRC.

21. On November 12, 1993, the defendant was visited by Lynn Lamberty of TRC.

22. On November 17, 1993, the defendant filed a pro-se motion for stay claiming he had no counsel or access to counsel.

23. On November 19, 1993, the TRC notified the court that Gregory Burr Macaulay of Washington D. C. was willing to undertake representation in this case subject to specified conditions:

- pay him $50 per hour
- pay for 7-10 trips to Texas for himself and either co-counsel or his paralegal
- appoint a second counsel at the same rate
- appoint a full time paralegal
- receive periodic payments monthly
- receive 180 days in which to file a petition for habeas corpus application

CONCLUSIONS

Both the defendant and the Texas Resource Center have had more than ample time to recruit and obtain counsel to file an application for habeas corpus relief since his conviction was affirmed on February 24, 1993. 9 months have passed since that date. The Texas Resource Center located an attorney willing to represent the defendant just 2 days after filing the motion for stay.

The defendant and the Texas Resource Center have deliberately and intentionally manipulated access to habeas corpus review as a matter of strategy and not the result of legitimate misfortune.

The defendant has been in virtually constant contact with TRC even before this conviction was affirmed by the Court of Criminal Appeals.

Neither the defendant or TRC has requested the appointment of counsel in a period of almost 9 months. It is only on the very verge of execution that the defendant claims a need for help in representation - help that at least one lawyer was willing to give under certain conditions but ONLY on the eve of execution.

Further, nobody has even advanced a meritorious ground of relief that if found to exist would result in a beneficial ruling to the defendant.

No one has explained why nothing was done by either the defendant or TRC until days before his scheduled execution. No counsel was recruited nor is there any showing of any attempt at recruitment. No request for the appointment of counsel was advanced by the defendant. Yet during all of this time, the defendant and TRC were meeting and corresponding on a regular and frequent basis. On each meeting, TRC attorneys affirmed that the visit was solely "related to the attorney-client . . . relationship and for no other purpose."

By waiting until shortly before execution to request counsel and a stay, both the defendant and TRC are dangling his life in a perilous maneuver deliberately contrived to pressure the legal system to delay his execution. The defendant is an emergency he and TRC created, and this type of manipulation should not be permitted to prevail by any Texas or Federal Court.

The record does not support the TRC claim that their purpose is limited to recruitment of counsel. The record is full of instances where TRC, when it elected to do so, represented this defendant. TRC attorneys sought and received from the Court of Criminal Appeals, an extension to file a motion for rehearing. They obtained the appellate record. They frequently visited the defendant certifying on each occasions that the visit was in furtherance of the attorney-client relationship. And finally, they prepared and filed the defendant's "pro-se" application for stay and other related motions, acting at all times as his legal representative.

The status of TRC can not, like the tide, roll in and roll out when it suits their purpose. They either represent someone or they don't. If they don't, then they should not be heard on any issue as they have no standing. If they do, then they should be

held to the same "effective representation" standards they so often use against others. And effective representation certainly requires that legal issues be addressed in a timely and orderly manner.

Their deliberate strategic plans have resulted in many other defendants receiving a stay. In fact, a stay under these circumstances has become virtually automatic and the expectations of defendants and TRC have been fulfilled. As long as courts continue to permit defendants and TRC to manipulate the orderly administration of justice, they will continue to successfully do so.

This Court does not and will not approve of such dilatory actions that cause the disruption of our legal system. The motion for stay is hereby DENIED, and the Court further strongly urges that the Court of Criminal Appeals and the Federal Courts do likewise. To do otherwise will permit this type of sham to perpetuate, proliferate and continue to bring discredit and disrespect to our legal system.

The clerk will immediately serve this notice by telephone and FAX to:

1. The Clerk of the Court of Criminal Appeals
2. The Clerk of the 186th District Court of Bexar County
3. The District Attorney of Jefferson County, Texas
4. The Attorney General of Texas
5. The Texas Resource Center
6. The Defendant

The Clerk will also immediately transmit all documents in this cause by Express Overnight Mail to the Clerk of the Court of Criminal Appeals.

Since this case originated in Jefferson County, the District Clerk of Jefferson County is ordered to perform all of the actions reflected in this Order.

Signed and entered November 22, 1993.

_____

Larry Gist, Judge Presiding

Lockhart

10/25/88 Conviction and Sentence

12/2/92 Court of Criminal Appeals--aff'd

12/5/93 Correspondence, Court Crim. App. to Lockhart

12/10/92 Correspondence, Barlow, appellate counsel, to Lockhart

12/17/92 Barlow informed Jeffrey Pokorak (TRC) that he would not file motion for rehearing.

12/17/92 Eden Harrington (TRC) requests 45 day extension of time in which to recruit counsel and file motion for rehearing. Extension until 2/1/93 granted by Court Crim. App.

12/21/92 Correspondence, Court Crim. App. to Lockhart

1/14/93 TRC checked out appellate records (-21)

2/2/93 Motion for rehearing filed in Court Crim. App. by Stephanie L. Barclay

2/4/93 Correspondence, Court Crim. App. to Lockhart

2/8/93 Correspondence, Lockhart to TRC

2/10/93 TRC (Phyllis L. Crocker) visit

2/11/93 Correspondence, TRC to Lockhart

2/17/93 Correspondence, Lockhart to TRC

2/23/93 Correspondence, TRC to Lockhart

2/24/93 Court Crim. App.--reh'g denied

2/24/93 Correspondence, TRC to Lockhart

3/4/93 Correspondence, Court Crim. App. to Lockhart

3/19/93	Correspondence, Virgil Clark, atty, Toledo, OH, to Lockhart

3/23/93 Correspondence, TRC to Lockhart

3/26/93 Correspondence, Court Crim. App. to Lockhart

4/1/93	Correspondence, Lockhart to Virgil Clark, atty, Toledo, OH
5/24/93	Correspondence, public defender of Indiana to Lockhart

5/24/93 Correspondence, Lockhart to TRC, Lynn Lamberty,

5/25/93 Supreme Court--Cert. petition filed by Daniel J. Givelber, 400 Huntington Ave, Boston, MA 02115

7/2/93 Trial court--Order scheduling execution for 10/23/93

7/13/93 S.O.Woods office received death warrant, Lockhart's custody status was changed because of scheduled execution.

7/13/93 Log book in death row office shows that Lockhart was notified of new execution date by Sgt Cabeen

7/14/93 TRC (Lynn Lamberty) visit

8/6/93	Correspondence, public defender of Indiana to Lockhart
8/9/93	Correspondence, Lockhart to public defender of Indiana

8/24/93 Supreme Court--Brief in opposition filed

9/1/93	Correspondence, Lockhart to public defender of Indiana
9/1/93	Correspondence, Supreme Court of Florida to Lockhart
9/2/93	Correspondence, public defender of Indiana to Lockhart
9/7/93	Correspondence, Lockhart to public defender of Indiana
9/17/93	Correspondence, public defender of Indiana to Lockhart

10/4/93 Supreme Court--Cert denied

10/13/93 Correspondence, COCA (Court of Crim App) to Lockhart

10/27/93 Correspondence, TRC to Lockhart

11/1/93 Correspondence, Lockhart to TRC

11/5/93 TRC (Elizabeth Cohen) visit

11/10/93 TRC (Lynn Lamberty) visit

11/12/93 TRC (Lynn Lamberty) visit

11/17/93 Trial court (Bexar)--pro se motion for stay or modification of execution date to allow TRC to recruit counsel. Request 120 days to recruit, 120 days to file.

EX PARTE MICHAEL LEE LOCKHART

Habeas Corpus Application

Writ No. 25,669-01 From BEXAR County

OPINION DISSENTING TO ORDER

As the summary order of the Court indicates, this applicant is without counsel, yet is scheduled to be put to death at an early morning hour of Tuesday next. Thus, without benefit of counsel he is reduced to filing pro se his first post-conviction petition for a writ of habeas corpus and representing himself because this Court refuses to grant his motion to stay his impending execution so that the Texas Resource Center may recruit competent counsel to assist and to represent him.

I respectfully dissent, urging this Court to confront headon "the crisis stage in capital representation" in this State. The Spangenburg Group, A Study of Representation of Capital Cases in Texas (State Bar of Texas), at i-ii.

Meanwhile, we should consider the motion and supporting papers as pleadings in the nature of an application for extraordinary relief, thereby invoking the constitutional original jurisdiction of this Court under Article V, §5, para. three, and as further prescribed by Article 4.04, §1, V.A.C.C.P.

On that basis we should cause the Court to stay the scheduled execution of applicant.

Further, I would order and direct the judge of the convicting court below to recall its warrant of execution pursuant to Tex.R.App.Pro. 233; to exercise its authority to determine whether applicant is "indigent" within the meaning of Articles 26.04 and 26.05, V.A.C.C.P.; if so, to determine whether "the interests of justice" require that applicant have representation of counsel in a post-conviction habeas corpus proceeding; and, if so, to appoint competent counsel to aid and assist applicant in preparing and filing a petition for such writ of

post-conviction habeas corpus in accordance with Article 11.07 and related provisions in Chapter Eleven, V.A.C.C.P., and to represent applicant in the resultant proceedings under Article 11.07, including proceedings upon return of the writ and accompanying record to this Court.

With available assets at hand this Court and judges of convicting courts must utilize them to ease the current "crisis in capital representation." We should not be reluctant to preserve resort to postconviction remedies on account of some perceived fault in the representative of the party seeking benefits of those remedies.

CLINTON, Judge

DELIVERED: November 22, 1993
EN BANC
PUBLISH

APPENDIX C

INMATE	EXEC. DATE	STATUS	COURT	COUNSEL	Sched. Order
Zimmerman, Keven	11/2/93	Reversed	Supreme Court	Reversed on Direct Appeal with Counsel	No
Jones, Richard	11/2/93	Withdrawn	Trial Court	TRC representing	Yes
Fuller, Aaron	11/3/93	Withdrawn	Trial Court	TRC representing	Yes
Cook, Anthony	11/10/93	Volunteer	NA	Executed on 11/10/93	No
Johnson, Dorsie	11/12/93	Modified to 1/27/94	Trial Court	TRC representing	Yes
Vega, Martin	11/18/93	Modified to 3/18/94	Trial Court	Court Appt'd TRC/recruit	Yes
Lockhart, Micheal	11/23/93	Stayed	Fed. Dist. Ct.	TRC recruited counsel	Yes
Joiner, Orien C.	12/3/93	Modified to 2/4/94	Trial Court	No Counsel	No
Cantu, Domingo	12/8/93	Modified to 5/5/94	Trial Court	Court Appt'd TRC/recruit	No
Rabbani, Syed	12/14/93	Withdrawn	Trial Court	TRC recruited counsel	Yes
Muniz, Pedro	1/5/94	Modified to 4/8/94	Trial Court	Court Appt'd Counsel	Yes
Moreland, James	1/6/94	Withdrawn	Trial Court	Outside counsel agreed to represent	Yes
Jackson, Jimmy	1/18/94	Withdrawn	Trial Court	TRC recruited counsel	Yes
Moreno, Jose	1/19/94	Stayed	Supreme Court	No Counsel	NA
Nelson, Marlin	1/21/94	Withdrawn	Trial Court	No Counsel	No
Fuller, Tyronne	1/25/94	Withdrawn	Trial Court	TRC recruiting counsel	Yes
Draughon, Martin	1/25/94	Withdrawn	Trial Court	TRC recruited counsel	Yes
Green, Ricky Lee	1/25/94	Stayed	Trial Court	Court Appt'd Counsel Filed State Habeas	Yes
Johnson, Dorsie	1/27/94	Stayed	Fed. Dist. Ct.	TRC representing	NA

APPENDIX D

Texas Capital Statistics

I. The following chart shows the number of cases affirmed by the Texas Court of Criminal Appeals by month from 1992 to 1993.

		Month						Thru June 92-93
		Jan.	Feb.	Mar.	April	May	June	
Year	1992	1	4	3	3	4	3	18
	1993	9	4	3	3	7	8	34
		July	Aug.	Sept.	Oct.	Nov.	Dec.	Total 1992-93
	1992	0	0	4	2	2	5	31
	1993	1	0	13	5	4	2	59

II. The number of inmates assigned to death row each year since 1980.

Year	'80	'81	'82	'83	'84	'85	'86	'87	'88	'89	'90	'91	'92	'93
#	25	25	29	22	23	37	43	20	20	14	14	23	19	36

APPENDIX E

TEXAS LEGISLATIVE SERVICE **ENGROSSED**
5/12/93 **HB 1562**

9-11-234*

RE: Gallego - Writ of habeas corpus for death sentence

A BILL TO BE ENTITLED

AN ACT

relating to procedures for petitioning for a writ of habeas corpus by persons sentenced to death and procedures for the compensation and appointment of counsel to represent persons sentenced to death.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 11, Code of Criminal Procedure, is amended by adding Article 11.071 to read as follows:

Art. 11.071. PROCEDURE IN CAPITAL FELONY CASE

Sec. 1. APPLICATION TO CAPITAL FELONY CASE. Notwithstanding any other provision of this chapter, this article establishes the procedures for a petition for a writ of habeas corpus in which the petitioner seeks relief from a judgment imposing a penalty of death.

Sec. 2. REPRESENTATION BY COUNSEL. (a) A petitioner shall be represented by counsel unless the petitioner has elected to proceed pro se and the convicting trial court finds,

after a hearing on the record, that the petitioner's election is intelligent and voluntary.

(b) Immediately after judgment is entered under Article 42.01 of this code, the convicting court shall determine if the defendant is indigent and desires appointment of counsel for purposes of a writ of habeas corpus. The clerk of the convicting court shall immediately forward to the court of criminal appeals a copy of the judgment, a list containing the name, address, and telephone number of all counsel of record for the petitioner at trial and on direct appeal, and, if the defendant elects to proceed pro se, any findings made by the convicting court on the voluntariness of the defendant's election.

(c) Unless an indigent petitioner is represented by retained counsel, the court of criminal appeals shall appoint counsel at the earliest practicable time under rules adopted by the court.

(d) The court of criminal appeals may not appoint an attorney as counsel under this section if the attorney represented the defendant at trial or on direct appeal, unless:

(1) the defendant and the attorney request the appointment on the record; and

(2) the court finds good cause to make the appointment.

(e) If counsel is the same person appointed as counsel on appeal under Article 26.052 of this code, the court of criminal appeals shall appoint a second counsel to assist in the preparation of the appeal and writ of habeas corpus.

(f) An attorney appointed by the court of criminal appeals under this section is compensated as provided by a fee schedule adopted by the court from state funds.

Sec. 3. INVESTIGATION OF GROUNDS FOR PETITION. (a) On appointment, counsel shall investigate

expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of a petition for a writ of habeas corpus.

(b) Not later than the date the petitioner's direct appeal brief is filed, counsel may file an ex parte confidential request for expenses to investigate potential habeas corpus issues with the court of criminal appeals. The court shall consider an initial request filed at a later time only if good cause for the delay is shown.

(c) The request for expenses shall state:

(1) the claims of the petition to be investigated;

(2) specific facts that suggest that a claim of possible merit may exist; and

(3) an itemized list of anticipated expenses for each claim.

(d) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. On presentation by counsel of an accounting of investigative expenses incurred, the court shall order reimbursement of counsel, in an amount not exceeding the amount authorized.

(e) Counsel may incur reasonably necessary expenses for habeas corpus investigation without prior approval by the court of criminal appeals. On presentation of a claim for reimbursement, the court shall order reimbursement of counsel for expenses reasonably necessary and reasonably incurred.

Sec. 4. FILING OF PETITION. (a) A petition for writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting trial court not later than the 150th day after the date the appellee's brief is filed on direct appeal to the court of criminal appeals. A petition filed after this date is presumed to be untimely.

(b) A petitioner may file a petition later than the 150th day after the date the appellee's brief is filed on direct appeal to the court of criminal appeals if the petitioner establishes good cause for filing the untimely petition.

(c) A failure to file a petition before the 181st day after the date the appellant's brief is filed on direct appeal constitutes a waiver of all grounds for relief that were available to the petitioner before that date, except as provided by Section 5 of this article.

Sec. 5. SUBSEQUENT OR UNTIMELY PETITION.

(a) If an original petition for a writ of habeas corpus is untimely or if a subsequent petition is filed after filing an original petition, a court may not grant relief based on the subsequent or untimely original petition unless the petition contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely original petition or in a previously considered petition filed under this section because the factual or legal basis for the claim was unavailable:

(A) on the date the petitioner filed the previous petition; or

(B) if the petitioner did not file an original petition, on or before the last date for the timely filing of an original petition;

(2) by clear and convincing evidence, a probability exists that the petitioner is factually innocent of the capital felony for which the petitioner was convicted because of a violation of the United States Constitution or the laws of this state; or

(3) by clear and convincing evidence, in the absence of a violation of the United States Constitution or the

laws of this state, no rational jury could have answered in the state's favor one or more of the special issues that were submitted to the jury in the petitioner's trial under Article 37.071 of this code.

(b) If the convicting court receives a subsequent petition or an untimely original petition, the clerk of the court shall attach a notation that the petition is a subsequent or untimely original petition, assign to the case a file number that is ancillary to that of the conviction being challenged, and immediately send to the court of criminal appeals a copy of the petition, the notation, the order scheduling the petitioner's execution, if scheduled, and any order the judge of the convicting court directs to be attached to the petition.

(c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of this section to allow consideration of the petition have been satisfied. The convicting court may not take further action on the petition before the court of criminal appeals issues an order finding the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the petition as an abuse of the writ under this section.

(d) For purposes of Subsection (a)(1) of this section, a legal basis for a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis:

(1) was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date; or

(2) is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court and had not been announced by the court on or before that date.

(e) For purposes of Subsection (a)(1) of this section, a factual basis for a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

Sec. 6. ISSUANCE OF WRIT. (a) If an untimely original or subsequent petition found to meet the requirements for consideration under Section 5 of this article or a timely petition for a writ of habeas corpus is filed in the convicting trial court, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b) The clerk of the convicting court shall make an appropriate notation that a writ of habeas corpus was issued, assign to the case a file number that is ancillary to that of the conviction being challenged, and send a copy of the petition by certified mail, return receipt requested, to the attorney representing the state in that court.

Sec. 7. ANSWER TO PETITION. (a) The state shall file an answer to the petition for a writ of habeas corpus not later than the 30th day after the date the state received the petition. The state may request an extension of time in which to answer the petition by showing particularized justifying circumstances for the extension.

(b) Matters alleged in the petition not admitted by the state are deemed denied.

Sec. 8. FINDINGS OF FACT WITHOUT HEARING.

(a) Not later than the 20th day after the last date the state may answer the petition, the convicting court shall determine whether controverted, previously unresolved factual issues material to the legality of the petitioner's confinement exist and shall issue a written order of the determination.

(b) If the court determines the issues do not exist, the parties may file proposed findings of fact and conclusions of law for the court to consider on or before a date set by the court that is not later than the 30th day after the date the order is issued.

(c) After argument of counsel, if requested, the court shall make appropriate written findings of fact and conclusions of law not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court's determination is made under Subsection (a) of this section, whichever occurs first.

(d) The clerk of the court shall immediately send to the court of criminal appeals a copy of the petition, answer, orders entered by the convicting court, proposed findings of fact and conclusions of law, and findings of fact and conclusions of law entered by the court.

(e) Failure of the court to issue findings of fact and conclusions of law within the time provided by Subsection (c) of this section constitutes a finding that controverted, previously unresolved factual issues material to the legality of the petitioner's confinement do not exist.

Sec. 9. HEARING. (a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the petitioner's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state may answer the petition, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. The court may require affidavits, depositions, interrogatories, and evidentiary hearings as appropriate.

(b) The convicting court shall allow the petitioner and the state not less than 10 days to prepare for an evidentiary hearing. The parties may waive the preparation time. If the state or the petitioner requests that an evidentiary hearing be

held within 30 days after the date the court ordered the hearing, the hearing shall be held within that period unless the court states, on the record, good cause for delay.

(c) The clerk of the convicting court shall promptly deliver copies of documents submitted to the clerk under this article to the petitioner and the attorney representing the state.

(d) The presiding judge of the convicting court shall conduct a hearing held under this section unless another judge presided over the original capital felony trial, in which event the judge, if qualified for assignment under Section 74.054 or 74.055, Government Code, may preside over the hearing.

(e) The Texas Rules of Criminal Evidence apply to an evidentiary hearing held under this section.

(f) The court reporter shall prepare a transcript of the hearing not later than the 30th day after the date the hearing ends and file the transcript with the clerk of the convicting court.

(g) The parties may file proposed findings of fact and conclusions of law for the convicting court to consider on or before a date set by the court that is not later than the 30th day after the date the transcript is filed. After argument of counsel, if requested, the court shall make written findings of fact that are necessary to resolve the previously unresolved facts and make conclusions of law not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court reporter files the transcript, whichever occurs first.

(h) The clerk of the convicting court shall immediately transmit to the court of criminal appeals a copy of the petition, answers and motions filed, court reporter's transcript, exhibits introduced into evidence, proposed findings of fact and conclusions of law, findings of fact and conclusions

of law entered by the court, and any other matters used by the court in resolving issues of fact.

Sec. 10. REVIEW BY COURT OF CRIMINAL APPEALS. The court of criminal appeals shall expeditiously review all petitions for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the petitioner or the state. After reviewing the record, the court shall enter its judgment remanding the petitioner to custody or ordering the petitioner's release, as the law and facts may justify.

Section 2. Chapter 26, Code of Criminal Procedure, is amended by adding Article 26.052 to read as follows:

Art. 26.052. APPOINTMENT OF COUNSEL TO DEFEND CAPITAL FELONY CASE; REIMBURSEMENT OF INVESTIGATIVE EXPENSES. (a) An indigent defendant charged with a capital felony is entitled to be represented by competent counsel at all stages of the criminal proceeding, including writs of habeas corpus. If a county is served by a public defender's office, trial counsel and counsel for direct appeal may be appointed as provided by the guidelines established by the public defender's office. In all other cases, trial counsel and counsel for direct appeal shall be appointed as provided by this article.

(b) A local selection committee is created in each administrative judicial region created under Section 74.042, Government Code. The administrative judge of the judicial region shall appoint the members of the committee. A committee shall have not less than four members, including the administrative judge of the judicial region, at least one district judge, a representative from the local bar association, and at least one practitioner board certified by the State of Texas in criminal law. The committee shall adopt standards for the qualification of attorneys for appointment to capital felony cases. The committee shall prominently post the standards in each

district clerk's office in the region with a list of attorneys qualified for appointment.

(c) The presiding judge of the district court in which a capital felony case is filed shall appoint counsel to represent an indigent defendant as soon as practicable after charges are filed. The judge shall appoint lead trial counsel from the list of attorneys qualified for appointment. The judge shall appoint a second counsel to assist in the defense of a person charged with a capital felony, unless reasons against the appointment appear on the record. Second counsel may be an attorney who is not on the list of attorneys qualified for appointment.

(d) Appointed counsel may file with the trial court a pretrial ex parte confidential request for expenses to investigate potential defenses. The confidential request for expenses shall state:

(1) the type of investigation to be conducted;

(2) the specific facts that suggests the investigation will result in admissible evidence; and

(3) an itemized list of anticipated expenses for each investigation.

(e) The court shall grant the request for expenses in whole or in part if the request is reasonable. On presentation by counsel of an accounting of investigative expenses incurred, the court shall order reimbursement of counsel in an amount not exceeding the amount authorized. If the court denies in whole or in part the request for expenses, the court shall state the reasons for the denial in writing, attach the denial to the confidential request, and submit the request and denial as a sealed exhibit to the record.

(f) If the indigent defendant is convicted of a capital felony and sentenced to death, the defendant is entitled to be represented by competent counsel on appeal.

(g) As soon as practicable after sentence is imposed, the presiding judge of the district court in which a capital felony conviction is returned shall appoint counsel to represent an indigent defendant on appeal.

(h) The court may not appoint an attorney as counsel on appeal if the attorney represented the defendant at trial, unless:

(1) the defendant and the attorney request the appointment on the record; or

(2) the court finds good cause to make the appointment.

(i) An attorney appointed under this article to represent a defendant at trial or on direct appeal is compensated as provided by Article 26.05 of this code from state funds.

Section 3. Article 43.14, Code of Criminal Procedure, is amended to read as follows:

Art. 43.14. EXECUTION OF CONVICT. Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time before the hour of sunrise on the day set for the execution not less than 60 [~~thirty~~] days from the day the court sets the execution date, as the court may adjudge, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the Director of the institutional division of the Texas Department of Criminal Justice.

SECTION 4. Chapter 43, Code of Criminal of Criminal Procedure, is amended by adding Article 43.141 to read as follows:

Art. 43.141. WITHDRAWAL OR MODIFICATION OF EXECUTION DATE. (a) The convicting court may modify or withdraw the order of the court setting a date for

execution in a death penalty case if the court determines that additional proceedings are necessary on a petition for a writ of habeas corpus filed under Article 11.071 of this code.

(b) No execution date shall be set before the court of criminal appeals enters its judgment on the initial petition for a writ of habeas corpus submitted under Article 11.071 of this code, so long as the petition is timely filed or good cause is shown for its untimely filing. After judgment has been entered, the convicting court may set an execution date pursuant to Article 43.14 of this code. If no petition is filed or good cause is not shown for an untimely petition, an execution date may be set by the convicting court.

(c) If the convicting court withdraws the order of the court setting the execution date, the court shall recall the warrant of execution. If the court modifies the order of the court setting the execution date, the court shall recall the previous warrant of execution, and the clerk of the court shall issue a new warrant.

SECTION 5. The rulemaking authority granted to the court of criminal appeals under Section 22.108, Government Code, is withdrawn with respect to rules of appellate procedure relating to a petition for a writ of habeas corpus by a defendant under a sentence of death, but only to the extent the rules conflict with a procedure under Article 11.071, Code of Criminal Procedure, as added by this Act.

SECTION 6. (a) The change in law made by Article 11.071, Code of Criminal Procedure, as added by this Act, applies only to a capital felony for which a judgment of conviction is entered on or after the effective date of this Act. A capital felony for which a judgment of conviction is entered before the effective date of this Act is covered by the law in effect when the judgment was entered, and the former law is continued in effect for this purpose.

(b) The change in law made by Article 26.052, Code of Criminal Procedure, as added by this Act, applies only to an offense committed on or after the effective date of this Act or to a capital felony for which the court of criminal appeals or a court of the United States has entered an order granting a new trial or a new punishment hearing on or after the effective date of this Act.

(c) For purposes of Subsection (b) of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date. An offense committed or a capital felony for which an order granting a new trial or a new punishment hearing is entered before the effective date of this Act is covered by the law in effect when the offense was committed or the order was entered, and the former law is continued in effect for this purpose.

SECTION 7. This Act takes effect September 1, 1993.

SECTION 8. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

APPENDIX F

TEXAS
CRIMINAL
DEFENSE
LAWYERS
ASSOCIATION

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Austin, Texas 78701/Phone (512) 478-2514 JOHN C. BOSTON SUSAN GOGGAN
FAX (512) 469-9107 EXECUTIVE DIRECTOR ATTORNEY/EDITOR

POLICY STATEMENT OF TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

ON C.S.H.B. NO. 1562 BY GALLEGO
April 18, 1993

The purpose of C.S.H.B. No. 1562 is to enact changes in the procedures related to habeas corpus appeals by persons sentenced to death. By prior vote of its Board of Directors, the Texas Criminal Defense Lawyers Association ("T.C.D.L.A.") is opposed to the use of capital punishment as a sanction for crime. Given that capital punishment is the law in Texas, however, the T.C.D.L.A. is vitally interested in the procedures under which the death penalty is applied and capital cases are litigated. Accordingly, the T.C.D.L.A. offers this policy statement in order to clarify its opposition to the majority of the habeas corpus procedures proposed in C.S.H.B. No. 1562 by Representative Gallego.

The defense bar agrees that the present system of post-conviction litigation in capital cases in this state is severely flawed. In order to move cases through the courts in a more orderly, expeditious fashion and to ensure that defendants receive adequate legal representation before they are executed, reform of the current procedures are necessary. While the present system is unacceptable, C.S.H.B. No. 1562 creates far

more problems than it may solve. The bill is designed to promote speed virtually to the exclusion of all other concerns but will not achieve this aim. Many of the proposed procedures place unreasonable burdens upon trial courts and defense attorneys, which would cause serious additional problems and likely result in even lengthier delays in the final disposition of cases.

The T.C.D.L.A. stands ready to work with interested parties in developing realistic procedures to reform capital habeas litigation in Texas. Unfortunately, this bill falls far short of the minimum requirements and legal protections necessary to remedy the present problems. Below is a brief discussion of the nature of habeas corpus proceedings, existing systematic problems, reforms necessary to ensure that cases are expeditiously and fairly resolved, and an analysis of the flaws in the current proposal.

Purpose of Habeas Corpus Proceedings

Habeas corpus proceedings are the legal mechanism provided in the state and federal courts by which an inmate can attack the validity of his or her conviction and sentence. Once a defendant is convicted and sentenced in Texas, the case is automatically appealed to the Court of Criminal Appeals. This appeal is limited to the issues and evidence preserved in the trial record. Following the direct appeal, a death row inmate may seek review of the case by the Supreme Court of the United States through a petition for writ of certiorari. Certiorari is a discretionary remedy, and the inmate's conviction and sentence are deemed final if certiorari is denied. If certiorari is not sought or is denied, an inmate may initiate habeas corpus proceedings.

Only in a habeas corpus proceeding may an inmate present evidence and argument from outside the confines of the trial record. For example, extra-record evidence regarding either illegal suppression of evidence by the prosecution or the constitutionally deficient performance of trial counsel can be

presented only though a habeas corpus appeal. Given the irreversible nature of the death penalty, it is imperative that Texas ensure that inmates have an opportunity to fully litigate such issues before being executed.

The State of Texas requires that indigent death row inmates be provided legal counsel for their trial and direct appeal. Although federal courts are required to appoint and compensate counsel in capital habeas cases, Texas trial courts have discretion whether to appoint counsel in state habeas proceedings -- and rarely do so. However, a death row inmate cannot present habeas claims in federal court without first developing and presenting them in the state courts.

Problems With Present Capital Habeas Procedures

The present system of capital post-conviction litigation in Texas has two fundamental flaws, which in turn generate significant interrelated problems for the orderly administration of justice. First, indigent death row inmates are not ensured legal representation for their state habeas corpus proceedings. Second, execution dates are scheduled randomly by individual trial courts, often with the intent of advancing the litigation in a particular case and always without regard to the number of executions scheduled for the same time period throughout the state. These two defects -- lack of counsel and decentralized scheduling of executions -- consistently render state habeas proceedings chaotic. The frequent consequences are inadequate protection of the constitutional rights of the persons facing execution and unwarranted delay in the resolution of cases. Specific problems engendered by these flaws are:

1. Indigent death row inmates often face execution even though they do not have counsel and have not pursued their state habeas corpus remedies. Five unrepresented men on death row presently have execution dates.

2. Because execution dates are set by trial courts as a mechanism for advancing cases, most inmates have numerous execution dates before they are granted relief or are executed. Substantial time is wasted in litigation surrounding requests for stays of such unnecessary execution dates.

3. The decentralized scheduling of executions and the use of execution dates to advance cases result in the setting of an excessive number of dates: in 1992, 111 execution dates were set and 13 men were executed. Orderly litigation of so many capital cases is impossible, because:

   a. Courts are given insufficient time to consider post-conviction capital cases carefully and pleadings filed under the threat of an imminent execution date disrupt judicial courts' dockets and opposing parties' schedules; and

   b. Defense counsel lack sufficient time and resources to present claims and regularly are compelled to file inadequate last-minute pleadings and, as a result, successive petitions.

Minimum Requirements and Legal Protections Necessary to Address Current Problems

As discussed below, C.S.H.B. 1562 proposes a needlessly complicated set of procedures for capital habeas cases. This proposal unfairly restricts the rights of defendants and will create additional chaos and delay in the courts. Below is a brief summary of the minimum changes necessary to create a system in which cases move expeditiously through the courts and the rights of death-sentenced individuals are protected. The basic components of an effective systematic reform include: (1) filing deadlines for state and federal habeas corpus petitions, enforceable by sanctions against counsel, (2) an automatic stay of execution during the first round of habeas proceedings so

long as the applicant meets all filing deadlines, (3) a ban on successive petitions except for limited cases, and (4) appointed and fairly compensated counsel for inmates.

1. There are no filing deadlines for habeas corpus petitions under current law. Deadlines should be established that provide defense counsel a reasonable period of time in which to prepare and file the state and federal habeas petitions. A 180 day deadline for the state habeas petition is sufficient, measured from time of the denial of certiorari or the expiration of time for seeking certiorari on direct review; a 90 day deadline for the federal petition is sufficient, again measured from time of the denial of certiorari or the expiration of time for seeking certiorari on state habeas review.

2. Compliance with filing deadlines should be enforced by meaningful sanctions of the type commonly used by courts: contempt, fines, etc. Judicial use of such sanctions serves to control attorney behavior and litigation practices in all other contexts, and will succeed similarly in death penalty cases. The current practice of using execution dates to move cases must be changed.

3. Individual trial courts around the state presently schedule execution dates. Responsibility for setting execution dates should be centralized in the Court of Criminal Appeals or the Governor's Office. Execution dates should not be set during the initial round of habeas corpus proceedings so long as the applicant meets all applicable filing deadlines.

4. Nothing in present law bars an inmate from filing more than one state habeas petition. Successive petitions should be banned except in limited circumstances. A successive petition should be permitted only when an applicant can show that it presents a claim not previously adjudicated and (a) the claim was not discoverable

through the exercise of due diligence at the time of the prior petition, or (b) the claim is based on law not recognized by the state or federal courts at the time of the prior petition, or (c) the court concludes that, but for the violation of which the applicant complains, there is a reasonable probability that he or she would not have been convicted or sentenced to death, or (d) the claim should be considered to avoid a fundamental miscarriage of justice.

5. Defense counsel for state habeas proceedings must be appointed and fairly compensated. Compensation levels should reflect the complexity and demands of capital litigation. Counsel should be provided funds through the courts for necessary investigation and the assistance of experts.

Reasons for T.C.D.L.A. Opposition to C.S.H.B. 1562

C.S.H.B. No. 1562 is not a well-reasoned response to the fundamental flaws affecting the current system of litigating capital habeas cases. The bill places unreasonable burdens upon trial courts and defense attorneys and simply substitutes a new set of systemic problems for the current flawed procedures. The proposed procedures will themselves be vulnerable to attack and, consequently, will likely result in even lengthier delays in the final resolution of cases.

The T.C.D.L.A. strongly supports one change proposed in C.S.H.B. (Art. 11.071, Sec. 2): legal counsel should be appointed and compensated for state habeas corpus proceedings by the Court of Criminal Appeals. Beyond this provision, however, the bill is essentially unacceptable to the defense bar. The primary flaws of C.S.H.B. 1562 are summarized below.

1. The proposed unitary system, whereby habeas corpus proceedings are commenced before the direct appeal is decided, is inefficient and wastes funds.

The bill creates a unitary scheme (Art. 11.071, Sec. 4) whereby the direct appeal briefing and habeas corpus investigation occur simultaneously, and the habeas petition must be filed before the Court of Criminal Appeals renders it decision on the direct appeal. The T.C.D.L.A. is unequivocally opposed to this proposed unitary system, because it is inefficient, unrealistic, and needlessly complicated. In addition, the proposed system may be unconstitutional because it attempts to combine two distinct constitutional guarantees. The Court will be forced to evaluate habeas applications and records from evidentiary hearings held on those applications even when cases will eventually be reversed on direct appeal -- which occurs in at least 13% of capital appeals. In those instances, habeas counsel will have to be compensated for their considerable time and expenses even though their work was wholly unnecessary.

In many cases the direct appeal decision clarifies the legal issues and dictates whether those issues will be presented or not in a subsequent habeas application. This opportunity for legal development of issues will be lost, and may require the Court to evaluate needlessly duplicative issues.

2. The proposed judicial timetables are unnecessarily restrictive and may raise a separation of powers problem.

The bill (Art. 11.071, Sec. 8 and Sec. 9) proposes legislatively-imposed deadlines on virtually every aspect of a trial court's treatment of a capital habeas case. This approach suggests that courts cannot be trusted to make appropriate decisions about how to handle cases or their dockets, and may well be offensive to the Texas judiciary. Realistically, different cases present different demands on the judiciary. The T.C.D.L.A. presumes that state courts do the best they can, attempting to reach

results as expeditiously as justice permits. The time periods provided are far too short and too restrictive.

3. The bill's treatment of execution date scheduling will perpetuate last-minute litigation and stays.

The bill does not address the current problems that arise from frequent execution orders and the pursuit of stays -- from either the state or federal courts. At most, it (Art. 43.141) establishes discretion in the trial court to withdraw or modify an execution order. That section does not obligate the court to do so, even if a federal court transmits a "written request" -- for which, it should be noted, federal law makes no provision whatsoever. The bill also allows a trial court to modify an execution date for as little as ten days hence.

The bill clearly contemplates that execution dates will continue to be set regularly for inmates during their first round of habeas corpus proceedings, and certainly before their petitions are filed in federal court. As discussed above, this practice is not necessary to move cases, and causes many of the serious problems affecting the current system.

Filing deadlines, rather than execution dates, should be used to move litigation. Sensible stay provisions should be tied to the pendency of legal proceedings rather than to a fixed number of days.

4. The bill will increase constitutional litigation in the federal courts because it does not provide a reasonable opportunity to present a claim of ineffective assistance of counsel on appeal under the Sixth Amendment.

The bill (Art. 11.071, Sec. 2) establishes a presumption in favor of appointing as one of two habeas counsel the same individual who was counsel on the direct appeal.

Criminal defendants have a Sixth Amendment right to counsel at trial and on direct appeal. Accordingly, a constitutional ground for relief on state or federal habeas could be ineffectiveness of appellate counsel. However, appointing the same attorney on appeal and habeas prevents raising such a claim, even when a second attorney is also appointed on the habeas. The conflict of interest is obvious and irresoluable.

Nor can such a claim realistically be raised in a successive petition, since there is no provision in the bill for new, compensated counsel for a second round of habeas appeals. Consequently, the inmate will never be represented by counsel who does not labor under a conflict of interest that prevents raising a claim of ineffective assistance of appellate counsel.

5. The proposed time period for filing the initial habeas petition is too short.

As stated above, the T.C.D.L.A. is opposed to the bill's unitary system. The bill (Art. 11.071, Sec. 4) proposes that the initial habeas petition is due 90 days after the appeal brief is filed. 90 days is insufficient time to prepare and file a competent state habeas petition. The bill requires that the habeas investigation be undertaken before the appeal brief is completed. Where the appellate attorney is also one of the two habeas attorneys, it is unreasonable to assume that the appellate attorney will be participating in preparing the habeas petition at the same time he or she is completing the appeal brief. It is also unreasonable to assume that the appellate attorney will be able to prepare a habeas petition immediately after the appeal brief is filed.

Capital cases are extremely complex and time-consuming. The demands of most legal practices will prevent attorneys from spending all of their time on a

single case for months on end -- which is the only possible way the proposed scheme could work. If the habeas attorney is not the appellate attorney, he or she will require more than 90 days to complete the habeas petition in light of the issues raised in the appeal brief.

6. The proposed rule on successive petitions is overly restrictive.

As stated above, the T.C.D.L.A. supports reasonable limits on an inmate's ability to file successive petitions. However, this bill (Art. 11.071, Sec. 5) proposes an inappropriately restrictive approach to successive petitions. A comparison of the bill's provisions with those in current federal law cannot be accomplished briefly, but further discussion of the proper circumstances under which successive petitions should be considered is clearly necessary.

Conclusion

T.C.D.L.A. agrees that the present system of capital habeas litigation in Texas is severely flawed. In order to move cases through the courts in an expeditious manner and to ensure that the constitutional rights of defendants are protected before they are executed, reform of the current procedures is necessary. **Unfortunately,** C.S.H.B. No. 1562 creates far more problems than it may solve. The bill aims to promote the speedy disposition of cases, but will not achieve this goal. Many of the proposed procedures place unreasonable burdens upon trial courts and defense attorneys, which would cause serious additional problems and likely result in even lengthier delays.

The T.C.D.L.A. strongly supports one premise of C.S.H.B. (Art. 11.071, Sec. 2): legal counsel should be appointed and compensated for state habeas corpus proceedings by the Court of Criminal Appeals. Beyond this provision, however, the organized criminal defense bar is opposed to the

bill. Its provisions fail to provide the minimum requirements and legal protections necessary to constitutionally remedy the systemic problems in current capital habeas procedures.

John Boston, Executive Director, Texas Criminal Defense Lawyers Association

Richard Anderson, Texas Criminal Defense Lawyers Association (Board of Directors, President 1991-1992); Member, State Bar Committee on Legal Representation for those on Death Row

David Botsford, Texas Criminal Defense Lawyers Association (Secretary-Treasurer, Board of Directors)

Carlton McLarty, Chairman, Texas Criminal Defense Lawyers Association Committee on Death Row Representation

* * * * * * * * * * * *

The preceding policy statement is also endorsed by the individuals and organizations noted below, with the following additional comment:

We agree that indigent death row inmates must have access to appointed and fairly compensated legal counsel for state habeas corpus proceedings. Providing such counsel will help to speed up the disposition of cases, create a more orderly litigation process, and ensure the protection of defendants' constitutional rights. Accordingly, we join with T.C.D.L.A. in supporting the provisions in C.S.H.B. 1562 that mandate appointment of counsel.

The vast majority of habeas reform proposals on the federal level and in other states have recognized the need for established qualification standards for counsel. Unlike the T.C.D.L.A., we also believe that standards for appointing counsel are necessary. The bill (Art. 11.071, Sec. 2) is

insufficient in this regard, as it provides that the Court of Criminal Appeals act alone to appoint habeas corpus counsel. Instead, the Court should appoint a committee of individuals with experience in the defense side of capital habeas cases from across the state. That committee should be responsible for developing standards for counsel and maintaining a list of qualified attorneys in different areas. The Court could then appoint habeas counsel from the list of qualified attorneys.

Richard Burr, Director, Legal Defense Fund Death Penalty Project

Professor David R. Dow, University of Houston Law School

Eden Harrington, Executive Director, Texas Appellate Practice and Education Resource Center

APPENDIX G

COMMITTEE ON CRIMINAL JURISPRUDENCE
April 14, 1993
Room E2.016
8:15 a.m.

Pursuant to a public notice posted on April 7, 1993, the Committee on Criminal Jurisprudence met in a public hearing and was called to order by the Chair, Representative Allen Place.

Present: Representatives Place, Hartnett, Combs, De la Garza, Granoff, Greenberg, Nieto, Solis, Stiles, and Talton (10).

Absent: Allen (1)

A quorum was present.

S.B. 13 and H.B. 1605

The Chair laid out S.B. 13 and H.B. 1606 and recognized the authors, Senator Brown and Representative Combs to explain the bills.

The Chair recognized the following witnesses who testified in favor of the bill:

Vernon Gaston, representing the City of Garland;
Knox Fitzpatrick, representing John Vance, Criminal District Attorney, Dallas County.
Theresa Jeffers, representing herself;
Mark Clark, representing CLEAT;
Melissa Nelson, representing Justice for Children; and
S. C. Van Vleck, representing the Fort Worth Police Department.

The Chair recognized the following persons who testified on the bill:

Steve Hopson, representing the Texas Department of Public Safety (DPS); and
Susan Watkins, representing the Texas Department of Protective and Regulatory Services.

The Chair recognized the following persons who testified against the bills:

Ron Goranson, representing the Texas Criminal Defense Lawyers Association (TCDLA), and
John Boston, representing TCDLA

H.B. 798 and H.B. 1562

The Chair laid out H.B. 798 and H.B. 1562 and recognized the author, Rep. Gallego, to explain the bills.

The Chair recognized Attorney General Dan Morales to discuss the bills.

The Chair recognized the following witnesses to who testified in favor of the bills:

Sue Keys, representing herself;
Dennis Keys, representing himself; and
State District Judge Caprice Casper, representing herself.

The Chair recognized the following witnesses who testified against H.B. 1562:

Richard Burr, representing the NAACP Legal Defense to Educational Fund, Inc.

The Chair moved that the committee recess until 2 p.m. or upon adjournment. There being no objection, the committee recessed at 9:58 a.m.

The Committee reconvened at 6:40 p.m. in Room E2.026 and was called to order by the Chair, Representative Allen Place.

Present: Representatives Place, Hartnett, Allen, Combs, De la Garza, Nieto, Solis, Talton (8).

Absent: Representatives Granoff, Greenberg, Stiles (3).

A quorum was present.

H.B. 1562

The Chair laid out H.B. 1562. The Chair laid out a substitute for H.B. 1562.

The Chair recognized the following witnesses to testify on the bill:

Robert Walt, representing the Office of the Attorney general of Texas; and
Peggy Griffey, representing the Office of the Attorney General of Texas.

The Chair recognized the following witness to testify on the substitute:

John Boston, representing the TCDLA.

The Chair withdrew the substitute and moved that H.B. 1562 be referred to the Capital Punishment Subcommittee. There being no objection, the motion passed.

S.B. 13 and H.B. 1606

The Chair laid out S.B. 13 and H.B. 1606.

The Chair recognized the following witness who testified against the bills:

Levering Reynolds, III, representing himself, and the Texas Conference of Churches.

The Chair moved to send S.B. 13 and H.B. 1606 to the Capital Punishment Subcommittee. There being no objection, the motion was adopted.

H.B. 798

The Chair laid out H.B. 798. Rep. Combs moved to report H.B. 798 to the full house with the recommendation that it do pass. The motion prevailed by the following record vote:

Ayes: Place, Allen, Combs, De la Garza, Nieto, Solis, Talton (7).

Nays: None (0).

PNV: None (0).

Absent: Hartnett, Granoff, Greenberg, Stiles (4).

The following persons registered in favor of H.B. 1606 but did not testify:

Jan Hurley, representing Justice for Children;
Rita Nations, representing Justice for Children; and
Pat Gilmore, representing Justice for Children.

The following persons registered in favor of S.B. 13 but did not testify:

Diane Lynn Taylor, representing herself; and
Robert G. Carreiro, representing himself.

The following persons registered in favor of S.B. 13 and H.B. 1606:

Linda Kelley, representing herself and her murdered children, Mark and Kara; and Harriett Semander, representing herself.

The following persons registered on H.B. 1606:

Kathy J. Campbell, representing the Texas Department of Protective Regulatory Services.

The following person registered on S.B. 13 and H.B. 1606:

Shannon Noble, representing the Texas Women's Political Caucus; and

The following person registered for S.B. 13, H.B. 798 and H.B. 1606:

Madonna Petrucha, representing herself; and
Angela Cieslewicz, representing Parents of Murdered Children.

The following person registered for H.B. 798:

Aaron W. Northrup, representing himself.

The following persons registered in favor of H.B. 1562 but did not testify:

Patsy M. Teer, representing herself;
Wayne Strickler, representing himself;

Roe Wilson, representing the Harris County District Attorney's office. (A statement was entered into the record).
Aaron W. Northrup, representing himself;
Linda Kelley, representing herself;
Harriett Semander, representing herself;
Shirley Parish, representing herself, her husband, and her daughter, victim Kimberly Ann Strickler;
Karen Phillips, representing Justice for Children; and
Frank Phillips, representing Justice for Children.

The following persons registered on H.B. 1562 but did not testify:

David R. Dow, representing himself.

The following person registered against H.b. 1562 but did not testify:

Eden Harrington, representing the Texas Resource Center.

The following persons registered against H.B. 1562, S.B. 13, and H.B. 1606:

David Botsford, representing TCDLA; and
Edward F. Sherman, representing himself.

A statement was entered into the record from Robert L. Stearns, representing VIGIL.

Rep. Combs moved that the clerk correct the minutes from the March 1, 1993 Committee Hearing to show that House Bills 599, 602 and 77 were sent to the Sexual Assault Subcommittee, and correct the minutes from the February 22, 1993 Committee Hearing to show that H.B. 111 was sent to the Procedural Subcommittee. There being no objection, the motion passed.

Rep. Combs moved that the Committee adjourn. There being no objection, the Committee adjourned at 8:00 p.m.

Allen Place, Chair

Arlene E. Zirkel, Clerk

APPENDIX H

STATE of TEXAS
HOUSE of REPRESENTATIVES

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DEL RIO, TEXAS 78842-0663
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Pete P. Gallego
District 74
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(512) 463-0566

FOR IMMEDIATE RELEASE
TUESDAY, FEBRUARY 8, 1994

CONTACT: PETE GALLEGO @ 512 463-0566

GALLEGO WILL TRY AGAIN TO ELIMINATE UNWARRANATED DELAYS IN CAPITAL MURDER CASES

Austin - Texas State Representative Pete Gallego, D-Alpine, announced on Monday that he will re-file legislation during the 1995 session of the Texas Legislature to eliminate needless and seemingly endless delays in the appeal of capital convictions. The legislation was approved by the House of Representatives but failed to pass the Senate during the final hours of the 1993 legislative session.

Gallego credited the office of **Attorney General Dan Morales** for assisting in drafting the legislation and took opponents of the legislation to task. "Unfortunately, a good piece of legislation was killed due to intense lobbying by the Texas Criminal Defense Lawyers Association and the Texas Resource Center, which defends criminals convicted of capital murder," Gallego said.

The legislation will expedite review of both capital convictions and sentences by amending the state procedure used to review capital cases. The procedure is known as "habeas review." The bill would also provide for the appointment and compensation of defense counsel to

represent inmates on death row. It would also allow defense attorneys adequate time to litigate claims raised by inmates without being under the shadow of a pending execution date.

"Recently, allegations have been made that there is a crisis in death-row representation. The people making these allegations are the same people who killed this legislation in the Senate last session," Gallego said. "This legislation would have, and still will, resolve those problems. We can provide fair death-row representation and at the same time impose time limits and order on the state habeas review process."

Gallego's bill will limit an inmate under a sentence of death to one round of state habeas review and, with limited exceptions, require the inmate to raise all grounds of appeal in one application for habeas review. The bill also provides adequate timetables for the filing of the initial state habeas application and provides for qualified counsel to be appointed to represent the inmate immediately upon conviction.

If the United States Congress revives its proposed federal habeas reform, Gallego said state reform is imperative. In Texas, the habeas review process is initiated by the scheduling of an execution date. And, as Texas law does not currently provide for the appointment of counsel in state habeas review and does not require state habeas petitions to be filed within specific time periods, Texas would not be in compliance with proposed federal changes. Gallego stated, "That would bring executions and pending death penalty appeals to a complete standstill."

Gallego also voiced concern for the families and friends of victims of violent crime. "Our current system is an emotional roller-coaster for the families of victims, and an unnecessarily high financial burden on the State of Texas and its taxpayers," Gallego stated. "The purpose of the

legislation is to provide some stability to our system and eliminate excessive and unnecessary costs while at the same time assuring that death-row inmates have a fair and meaningful review of their cases."